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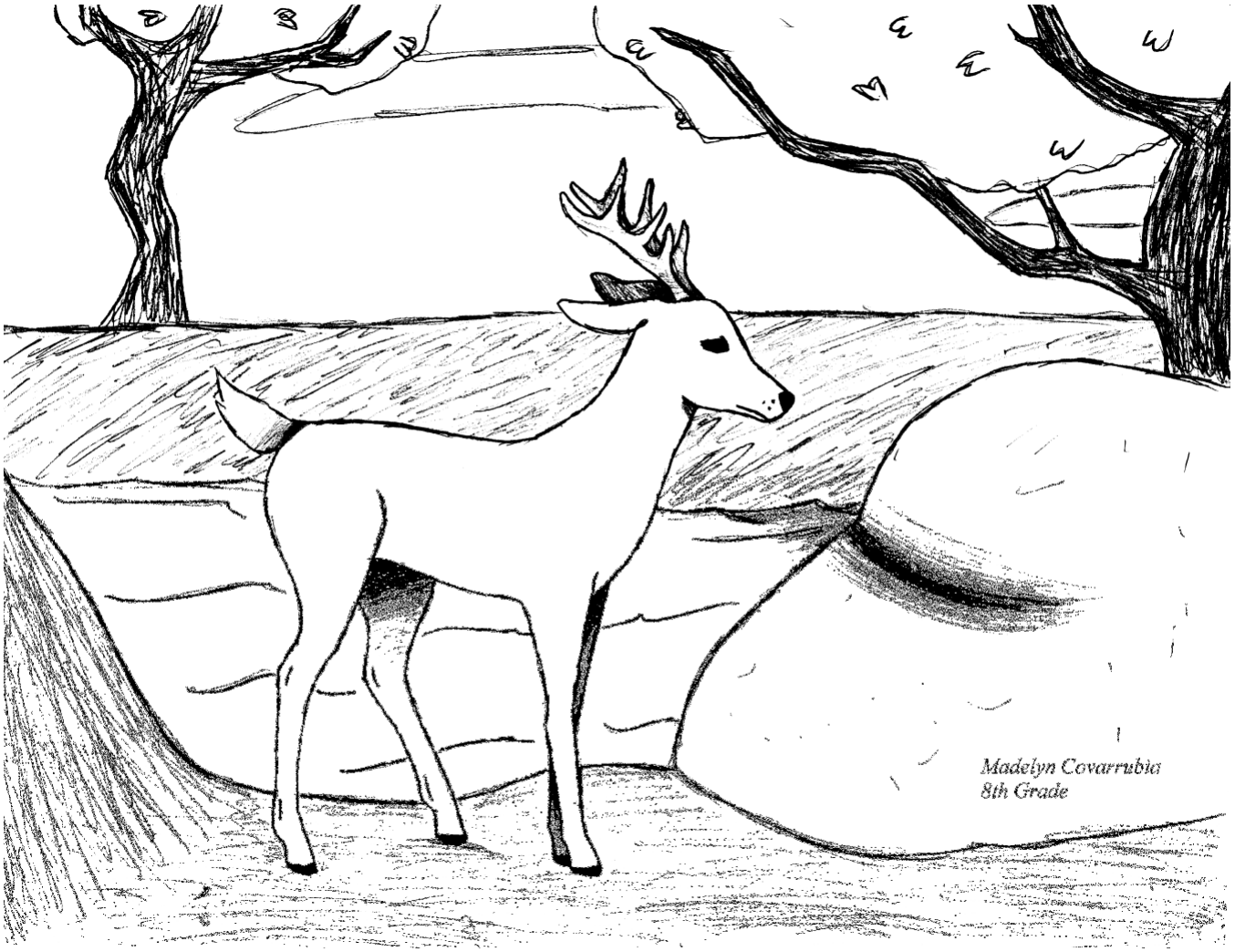

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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IN THIS ISSUE

TEXAS ETHICS COMMISSION

The Texas Ethics Commission is authorized by the Government Code, §571.091, to issue advisory opinions in regard to the following statutes: the Government Code, Chapter 302; the Government Code, Chapter 305; the Government Code, Chapter 572; the Election Code, Title 15; the Penal Code, Chapter 36; and the Penal Code, Chapter 39.

Requests for copies of the full text of opinions or questions on particular submissions should be addressed to the Office of the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, (512) 463-5800.

Advisory Opinion Request

AOR-538 Whether certain conduct constitutes legislative bribery under Chapter 302 of the Government Code, and whether a Member of the Texas House of Representatives (Member) has a duty to report the conduct to the appropriate authorities. The request letter also asks whether physical evidence, such as voice mail messages and electronic mail messages, need to be turned over to the Commission or to the appropriate authorities.

The Texas Ethics Commission is authorized by §571.091 of the Government Code to issue advisory opinions in regard to the following statutes: (1) Chapter 572, Government Code; (2) Chapter 302, Government Code; (3) Chapter 303, Government Code; (4) Chapter 305, Government Code; (5) Chapter 2004, Government Code; (6) Title 15, Election Code; (7) Chapter 159, Local Government Code; (8) Chapter 36, Penal Code; and (9) Chapter 39, Penal Code.

Questions on particular submissions should be addressed to the Texas Ethics Commission, P.O. Box 12070, Capitol Station, Austin, Texas 78711-2070, (512) 463-5800.

TRD-200606236
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Filed: November 15, 2006

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 1. OFFICE OF THE GOVERNOR

CHAPTER 3. CRIMINAL JUSTICE DIVISION

SUBCHAPTER H. CRIME STOPPERS PROGRAM CERTIFICATION

DIVISION 1. CRIME STOPPERS PROGRAM CERTIFICATION

1 TAC §§3.9000, 3.9007, 3.9011

The Crime Stoppers Advisory Council (Council) proposes the amendment of Subchapter H §3.9000.

The Council proposes the addition of Subchapter H §3.9007 and §3.9011.

The proposed amendment to §3.9000 allows the Council to examine whether a board member's occupation conflicts with the purposes of crime stoppers and assists the Council in obtaining relevant contact information that enables the Council to communicate more effectively with crime stoppers organizations. Additionally, the proposed amendment recognizes that probation fees are not only disbursed to crime stoppers organizations by community supervisions and corrections departments, but are also disbursed by courts and other government agencies.

The proposed addition of §3.9007 ensures that each complaint or allegation made against a crime stoppers organization is accurately presented to the Council and allows the Council time to properly analyze and assess the merits of each complaint or allegation. The proposed addition also clarifies that the Council may only consider complaints or allegations made against the types of crime stoppers organizations that are subject to the Council's authority to certify or decertify.

The proposed addition of §3.9011 assists the Council in obtaining up-to-date information regarding certified crime stoppers organizations so that the Council may communicate more effectively with these organizations.

Scott Bingaman, Director of Operations for the Office of the Governor, Criminal Justice Division, has determined that for the first five-year period the sections are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the sections.

Mr. Bingaman has also determined that for the first five-year period that the sections are in effect the public benefit anticipated as a result of enforcing the sections will be more efficient processes and procedures and the current rules will be more easily understood. There will be no anticipated economic cost to persons or businesses for complying with the proposed rules.

Comments on the proposed amendment and additions may be submitted to Heather Morgan, Office of the Governor, Criminal Justice Division, at hmorgan@governor.state.tx.us; P.O. Box 12428, Austin, Texas 78711; or (512) 463-1919. Comments must be received no later than 30 days from the date of publication of the proposal in the *Texas Register.*

The amendment of §3.9000, and the addition of §3.9007 and §3.9011, are proposed under the Texas Government Code, §414.006, which provides the Council with the authority to adopt rules to carry out its functions.

The amendment of §3.9000 implements the Texas Government Code, §414.011(a), which requires the Council to certify qualified crime stoppers organizations to receive payments and reward repayments.

The addition of §3.9007 implements the Texas Government Code, §414.011(d), which authorizes the Council to decertify a crime stoppers organization if it determines that the organization no longer meets the certification requirements.

No other statutes, articles, or codes are affected by the amendment and addition of these rules.

§3.9000. Certification.

(a) - (c) (No change.)

(d) A private, nonprofit crime stoppers organization must submit the following information to the director of the Crime Stoppers Advisory Council in order to obtain certification:

(1) - (3) (No change.)

(4) The name [~~names~~], mailing address, email address, [~~addresses and~~] telephone number, occupation, and board position [~~numbers~~] of each member [~~the members~~] of the organization's board of directors[~~, and the position held by each member~~];

(5) The name [~~names~~], mailing address, email address, [~~addresses~~] and telephone number [~~numbers~~] of each of the organization's law enforcement/civilian coordinators; and

(6) If the organization is currently certified by the Crime Stoppers Advisory Council or the organization's most recent certification expired within three years prior to submission of its application for certification, the organization must submit the following additional information:

(A) (No change.)

(B) documentation from the relevant courts or government agencies [~~community supervision and corrections departments~~] stating the amount of probation fees disbursed to the organization during the two-year certification period;

(C) - (D) (No change.)

(e) A public crime stoppers organization must submit the following information to the director of the Crime Stoppers Advisory Council in order to obtain certification:

(1) - (2) (No change.)

(3) The name [~~names~~], mailing address, email address, [~~addresses and~~] telephone number, occupation, and board position [~~numbers~~] of each member [~~the members~~] of the organization's governing board[~~, and the position held by each member~~];

(4) The name [~~names~~], mailing address, email address, [~~addresses~~] and telephone number [~~numbers~~] of each of the organization's law enforcement/civilian coordinators; and

(5) If the organization is currently certified by the Crime Stoppers Advisory Council or the organization's most recent certification expired within three years prior to submission of its application for certification, the organization must submit the following additional information:

(A) (No change.)

(B) documentation from the relevant courts or government agencies [~~community supervision and corrections departments~~] stating the amount of probation fees disbursed to the organization during the two-year certification period;

(C) - (D) (No change.)

(f) (No change.)

§3.9007. Complaints or Allegations Against a Crime Stoppers Organization.

Any complaint against a crime stoppers organization or allegation that a crime stoppers organization fails to meet the certification requirements described in §3.9000(b) of this chapter must be submitted in writing to the director of the Crime Stoppers Advisory Council. The Crime Stoppers Advisory Council may only consider complaints or allegations made against a crime stoppers organization that is certified, or has applied to be certified, by the Crime Stoppers Advisory Council pursuant to §3.9000 of this chapter.

§3.9011. Crime Stoppers Program Information Update Form.

(a) A crime stoppers organization that is certified by the Crime Stoppers Advisory Council must submit to the director of the Crime Stoppers Advisory Council a Crime Stoppers Program Information Update Form no later than January 31 of each calendar year.

(b) A Crime Stoppers Program Information Update Form must include the following information:

(1) The name, mailing address, email address, and telephone number of the crime stoppers organization, and the internet address of any website operated by the organization;

(2) The name, mailing address, email address, telephone number, occupation, and board position of each member of the organization's governing board; and

(3) The name, mailing address, email address, and telephone number of each of the organization's law enforcement/civilian coordinators.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 14, 2006.

TRD-200606200

David Zimmerman
Assistant General Counsel
Office of the Governor
Earliest possible date of adoption: December 31, 2006
For further information, please call: (512) 463-1919

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 9. LP-GAS SAFETY RULES

SUBCHAPTER A. GENERAL REQUIREMENTS

16 TAC §§9.2, 9.7, 9.10, 9.11, 9.52

The Railroad Commission of Texas proposes amendments to §§9.2, 9.7, 9.10, 9.11, and 9.52, relating to Definitions; Application for License and License Renewal Requirements; Rules Examination; Previously Certified Individuals; and Training and Continuing Education Courses. The Commission proposes these amendments to clarify some wording and procedures for the training and continuing education requirements.

In §9.2, the Commission proposes to amend the definition of "certificate holder" in paragraph (9) to add wording concerning transport drivers who hold a reciprocal examination exemption from another state pursuant to §9.18, relating to Reciprocal Examination Agreements with Other States, and general installers and repairmen who hold examination exemptions from the Commission's Gas Services Division pursuant to §9.13, relating to General Installers and Repairman Exemption. The purpose of this amendment is to clarify that holders of these examination exemptions receive Commission certification cards, enjoy the same rights and privileges, and are subject to the same requirements as individuals who are Commission-certified in these categories. In paragraphs (25) and (26), the Commission proposes new definitions for "mobile fuel container" and "mobile fuel system." The purpose of these amendments is to conform the definitions of these terms to the definitions in Texas Natural Resources Code §§113.002(17) and 113.002(18). In the definition of "person" in renumbered paragraph (35), the Commission proposes to substitute the word "venture" for "ventureship." In new paragraph (39), a new definition of "recreational vehicle" is proposed, consistent with the definition of this term in NFPA 1192, Standard on Recreational Vehicles (1999 edition). Paragraphs are numbered or renumbered so that the defined terms remain in alphabetical order.

In §9.7(a), the Commission proposes to reformat the long subsection to divide it into paragraphs, and to change the wording regarding training and continuing education requirements from "successfully completed" to "in compliance with the training and continuing education requirements." The reason for this proposed change is that an individual who has passed an examination that subjects him or her to a first-year training requirement, but who has not yet completed the training requirement, is in compliance with the Commission's training requirements and legally may work until the next May 31. Another proposed amendment in §9.7(a)(3) adds wording to clarify that certified individuals must be employed by a licensee or by a license-exempt entity, such as a political subdivision or

a state agency. In addition, proposed new §9.7(a)(4) is added to clarify that holders of general installer and repairman exemptions under §9.13 may legally perform the LP-gas activities authorized by such exemption. A sentence currently at the end of subsection (a) is proposed to be moved to subsection (b) with another existing requirement for licensees.

In §9.10, the Commission proposes some clarifying wording in new paragraphs (1) through (8) to describe the LP-gas activities authorized by each employee-level examination, as well as activities *not* authorized by an examination. Some of this descriptive wording was previously found on the Table incorporated as part of this subsection. None of this wording adds any new requirements, but merely clarifies current Commission practice.

In §9.11(a), the Commission proposes to delete the word "previously" to clarify that a licensee must file a transfer form when hiring a currently certified individual.

In §9.52(g), the Commission proposes a minor clarification in the reference in paragraph (3) to the 16-hour management-level class and proposes new paragraph (5) stating that a certified individual is exempt from the advanced field training (AFT) requirement of a continuing education course if the individual has previously completed that same course, including the AFT. In subsection (h), some changes are proposed to the Tables. On Table 1, the row for course 2.2 is deleted because that course has been superseded by other subsequently developed courses. For courses 3.1, 3.5, 3.7, 3.11, and the 16-hour Category F, G, I and J Management course, the "x" is proposed to be deleted from the AFT column because these courses now include similar hands-on activities during the classes. In the title of the table, the date of "September 2005" is proposed to be changed to "Revised January 2007" to indicate the month that these changes will be effective; the month may change upon adoption if the effective date is not in that month. On Table 2, the same changes are proposed as for Table 1 concerning the row for course 2.2 and the removal of AFT for courses 3.1, 3.5, 3.7, and 3.11, and the 16-hour Category F, G, I and J Management course. In addition, another proposed change for course 2.1 adds an "x" in the column for "Bobtail" and "Bobtail Service & Installation" to indicate that course 2.1 will be an approved course for these two categories of employee-level certification. This change would offer drivers whose job descriptions include filling bottles to take the Dispenser Operations course to fulfill their continuing education requirement. No changes are proposed in Table 3, which will retain the September 2005 date.

Dan Kelly, Director, Alternative Fuels Research and Education Division, has determined that for each year of the first five years the proposed amendments are in effect there will be no fiscal implications for state government as a result of enforcing or administering the amendments. The proposed amendments do not alter either the content of the Commission's training and continuing education courses or the frequency of their being offered; therefore, there is no additional cost or reduced cost to state government, nor is there an increase or decrease in revenue to state government as a result of enforcing or administering the rules as proposed to be amended. There are no anticipated fiscal implications for local governments.

Mr. Kelly has also determined that the public benefit anticipated as a result of the amendments will be clarification of Commission requirements regarding training and continuing education and expansion of the continuing-education options for bobtail drivers.

Texas Government Code, §2006.002 requires a state agency considering adoption of a rule that would have an adverse economic effect on small businesses or micro-businesses to reduce the effect if doing so is legal and feasible considering the purpose of the statutes under which the rule is to be adopted. Before adopting a rule that would have an adverse economic effect on small businesses, a state agency must prepare a statement of the effect of the rule on small businesses, which must include an analysis of the cost of compliance with the rule for small businesses and a comparison of that cost with the cost of compliance for the largest businesses affected by the rule, using cost for each employee, cost for each hour of labor, or cost for each $100 of sales.

Mr. Kelly has determined, pursuant to Texas Government Code, §2006.002(c), that there will be no additional costs to individuals, small businesses, or micro-businesses required to comply with the Commission's rules as a result of the proposed amendments. The proposed amendments do not alter either the content of the Commission's training and continuing education courses or the frequency of their being offered. Neither do the proposed amendments change the requirements for training and continuing education applicable to individual, small business, or micro-business licensees and certificate holders.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.html; or by electronic mail to rulescoordinator@rrc.state.tx.us. The Commission will accept comments until 5:00 p.m., Tuesday, January 2, 2007. The Commission encourages all interested persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Mr. Thomas Petru at (512) 463-6930. The status of Commission rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.html.

The Commission proposes the amendments pursuant to Texas Natural Resources Code, §113.051, which authorizes the Commission to adopt rules relating to any and all aspects or phases of the LP-gas industry that will protect or tend to protect the health, welfare, and safety of the general public, and §113.087, which authorizes the Commission to establish by rule an initial course of instruction for any person who has not yet passed the examination for the LPG activity for which the person seeks qualification; for any person who has not maintained qualified status, as defined by rule; and for any person whose certification has been revoked; and which requires the Commission, by appropriate rule, to require attendance at approved academic, trade, professional, or Commission-sponsored seminars, or other continuing education programs.

Statutory authority: Texas Natural Resources Code, §113.051 and §113.087.

Sections affected: Texas Natural Resources Code, §113.051 and §113.087.

Cross-reference to statute: Texas Natural Resources Code, Chapter 113.

Issued in Austin, Texas on November 14, 2006.

§9.2. Definitions.

In addition to the definitions in any adopted NFPA pamphlets, the following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (8) (No change.)

(9) Certificate holder--An individual:

(A) - (B) (No change.)

(C) who has passed the required employee-level qualification examination, has paid the applicable fee, and is required to comply with a training requirement as specified in §9.52 of this title (relating to Training and Continuing Education Courses); or

(D) who holds a current reciprocal examination exemption pursuant to §9.18 of this title (relating to Reciprocal Examination Agreements with Other States); or

(E) who holds a current examination exemption certificate pursuant to §9.13 of this title (relating to General Installers and Repairman Exemption).

(10) - (24) (No change.)

(25) Mobile fuel container--An LP-gas container mounted on a vehicle to store LP-gas as the fuel supply to an auxiliary engine other than the engine to propel the vehicle or for other uses on the vehicle.

(26) Mobile fuel system--An LP-gas system, excluding the container, to supply LP-gas as a fuel to an auxiliary engine other than the engine to propel the vehicle or for other uses on the vehicle.

(27) [~~(25)~~] Motor fuel container--An LP-gas container mounted on a vehicle to store LP-gas as the fuel supply to an engine used to propel the vehicle.

(28) [~~(26)~~] Motor fuel system--An LP-gas system, excluding the container, which supplies LP-gas to an engine used to propel the vehicle.

(29) [~~(27)~~] MPS gas (Methylacetylene-propadiene, stabilized)--A mixture of gases in the liquid phase and as defined in Texas Natural Resources Code, Chapter 113, §113.002(4).

(30) [~~(28)~~] Noncorrosive--Corrosiveness of gas which does not exceed the limitation for Classification 1 of the American Society of Testing Material (ASTM) Copper Strip Classifications when tested in accordance with ASTM D 1834-64, "Copper Strip Corrosion of Liquefied Petroleum (LP) Gases."

(31) [~~(29)~~] Nonspecification unit--An LP-gas transport not constructed to DOT MC-330 or MC-331 specifications but which complies with the exemption in 49 Code of Federal Regulations §173.315(k). (See also "Specification unit" in this section.)

(32) [~~(30)~~] Operations supervisor--The individual who is certified by the Commission to actively supervise a licensee's LP-gas operations and is authorized by the licensee to implement operational changes.

(33) [~~(31)~~] Outlet--A site operated by an LP-gas licensee from which any regulated LP-gas activity is performed.

(34) [~~(32)~~] Outside instructor--An individual, other than a Commission employee, approved by AFRED to teach certain LP-gas training or continuing education courses.

(35) [~~(33)~~] Person--An individual, partnership, firm, corporation, joint venture [~~ventureship~~], association, or any other business entity, a state agency or institution, county, municipality, school district, or other governmental subdivision, or licensee, including the definition of "person" as defined in the applicable sections of 49 CFR relating to cargo tank hazardous material regulations.

(36) [~~(34)~~] Portable cylinder--A receptacle constructed to DOT specifications, designed to be moved readily, and used for the storage of LP-gas for connection to an appliance or an LP-gas system. The term does not include a cylinder designed for use on a forklift or similar equipment.

(37) [~~(35)~~] Property line--The boundary which designates the point at which one real property interest ends and another begins.

(38) [~~(36)~~] Public transportation vehicle--A vehicle for hire to transport persons, including but not limited to taxis, buses (excluding school buses and mass transit or special transit vehicles), or airport courtesy vehicles.

(39) Recreational vehicle--A vehicular-type unit primarily designed as temporary living quarters for recreational, camping, travel, or seasonal use that either has its own motive power or is mounted on, or towed by, another vehicle.

(40) [~~(37)~~] Register (or registration)--The procedure to inform the Commission of the use of an LP-gas transport or container delivery unit in Texas.

(41) [~~(38)~~] Repair to container--The correction of damage or deterioration to an LP-gas container, the alteration of the structure of such a container, or the welding on such container in a manner which causes the temperature of the container to rise above 400 degrees Fahrenheit.

(42) [~~(39)~~] Rules examination--The Commission's written examination that measures an examinee's working knowledge of Chapter 113 of the Texas Natural Resources Code and/or the current LP-Gas Safety Rules.

(43) [~~(40)~~] School--A public or private institution which has been accredited through the Texas Education Agency or the Texas Private School Accreditation Commission.

(44) [~~(41)~~] School bus--A vehicle that is sold or used for purposes that include carrying students to and from school or related events.

(45) [~~(42)~~] Special transit vehicle--A vehicle designed with limited passenger capacity which is used by a school or mass transit authority for special transit purposes, such as transport of mobility impaired persons.

(46) [~~(43)~~] Specification unit--An LP-gas transport constructed to DOT MC-330 or MC-331 specifications. (See also "Nonspecification unit" in this section.)

(47) [~~(44)~~] Subframing--The attachment of supporting structural members to the pads of a container, excluding welding directly to or on the container.

(48) [~~(45)~~] Trainee--An individual who has not yet taken and passed an employee-level rules examination.

(49) [~~(46)~~] Training--Courses required to be successfully completed as part of an individual's requirements to obtain or maintain certain certificates.

(50) [~~(47)~~] Transfer--The procedure to inform the Commission of a change in operator of an LP-gas transport or container delivery unit already registered with the Commission.

(51) [~~(48)~~] Transfer system--All piping, fittings, valves, and equipment utilized in dispensing LP-gas between containers.

(52) [~~(49)~~] Transport--Any bobtail or semitrailer equipped with one or more containers.

(53) [~~(50)~~] Transport driver--An individual who operates an LP-gas trailer or semi-trailer equipped with a container of more than 5,000 gallons water capacity.

(54) [~~(51)~~] Transport system--Any and all piping, fittings, valves, and equipment on a transport, excluding the container.

(55) [~~(52) Ultimate consumer--The individual controlling LP-gas immediately prior to its ignition.~~

§9.7. Application for License and License Renewal Requirements.

(a) No person shall perform work or be employed in any capacity requiring contact with LP-gas unless:

(1) that individual has taken and passed any applicable rules examination specified in §9.10 of this title (relating to Rules Examination) and in §9.17 of this title (relating to Designation and Responsibilities of Company Representatives and Operations Supervisors);

(2) the individual is in compliance with the training and continuing education requirements beginning in §9.51 of this title (relating to General Requirements for Training and Continuing Education), except for a trainee described in §9.12 of this title (relating to Trainees);

(3) prior to performing authorized LP-gas activities in Texas, the individual is employed by a licensee or by a license-exempt entity, such as a political subdivision or a state agency; or

(4) the individual holds a current examination exemption certificate pursuant to §9.13 of this title (relating to General Installers and Repairman Exemption) and is therefore exempt from the requirements of this subsection.

[~~(a) No person shall perform work or be employed in any capacity requiring contact with LP-gas until that individual has taken and passed any applicable rules examination specified in §9.10 of this title (relating to Rules Examination) and in §9.17 of this title (relating to Designation and Responsibilities of Company Representatives and Operations Supervisors, and, except for a trainee described in §9.12 of this title (relating to Trainees), has successfully completed the training requirements beginning in §9.51 of this title (relating to General Requirements for Training and Continuing Education). Licensees, company representatives, and operations supervisors at each outlet shall have copies of all current licenses and examination identification cards for employees at that location available for inspection during regular business hours.~~]

(b) Licensees, company representatives, and operations supervisors at each outlet shall have copies of all current licenses and certification cards for employees at that location available for inspection during regular business hours. In addition, licensees [~~Licensees~~] shall maintain a current version of the LP-Gas Safety Rules and shall provide at least one copy to each company representative and operations supervisor. The copies shall be available to employees during business hours.

(c) - (g) (No change.)

§9.10. Rules Examination.

(a) (No change.)

(b) Table 1 of this subsection specifies the examinations offered by the Commission.
Figure: 16 TAC §9.10(b)

(1) The Bobtail examination qualifies an individual to operate a bobtail, to perform all of the LP-gas activities authorized by the Transport Driver, DOT Cylinder Filling, and Motor/Mobile Fuel examinations, and to perform leak checks and pressure tests, light appliances, and adjust regulators and thermocouples. The Bobtail examination does not authorize an individual to connect or disconnect containers, except when performing a pressure test or removing a container from service.

(2) The Transport Driver examination qualifies an individual to operate an LP-gas transport equipped with a container of more than 5,000 gallons water capacity, to load and unload LP-gas, and connect and disconnect transfer hoses. The Transport Driver examination does not authorize an individual to operate a bobtail or to install or repair transport systems.

(3) The Engine Fuel examination qualifies an individual to install LP-gas motor or mobile fuel containers, cylinders, and LP-gas systems and replace container valves on motorized vehicles, including trailers, catering trucks, mobile kitchens, tar kettles and similar vehicles, and non-road vehicles such as industrial trucks and stationary engines such as generators and pumps. The Engine Fuel examination does not authorize an individual to fill LP-gas motor or mobile fuel containers.

(4) The DOT Cylinder Filling examination qualifies an individual to inspect, requalify, fill, disconnect and connect cylinders, including industrial truck cylinders, and to exchange cylinder valves. The DOT Cylinder Filling examination does not authorize an individual to fill ASME motor or mobile fuel containers.

(5) The Recreational Vehicle examination qualifies an individual to install LP-gas motor or mobile fuel containers, including cylinders, and to install and repair LP-gas systems on recreational vehicles. The Recreational Vehicle examination does not authorize an individual to fill LP-gas containers.

(6) The Service and Installation examination qualifies an individual to perform all LP-gas activities related to stationary LP-gas systems, including LP-gas containers and appliances. The Service and Installation examination does not authorize an individual to fill containers or operate an LP-gas transport.

(7) The Appliance Service and Installation examination qualifies an individual to perform all LP-gas activities related to appliances, including installing, repairing and converting appliances, installing and repairing connectors from the appliance gas stop through the venting system, and to perform leak checks on the new or repaired portion of an LP-gas system. The Appliance Service and Installation examination does not authorize an individual to install a container, install or repair piping upstream of and including the appliance gas stop, or to install, repair or adjust regulators.

(8) The Motor/Mobile Fuel (Fuel Dispenser) examination qualifies an individual to inspect and fill motor or mobile fuel containers on vehicles, including recreational vehicles, cars, trucks, and buses. The Motor/Mobile Fuel (Fuel Dispenser) examination does not authorize an individual to fill LP-gas cylinders or ASME stationary containers.

(c) - (d) (No change.)

§9.11. Previously Certified Individuals.

(a) A licensee shall notify AFRED when a [~~previously~~] certified individual is hired by filing LPG Form 16A and a nonrefundable $10 fee with AFRED within 10 calendar days, or in lieu of that form, the $10 fee and a written notice including the employee's name as recorded on a current driver's license or Texas Department of Public Safety identification card, employee social security number, names of the newly-hired certified employee's previous and new employers, and types of LP-gas work to be performed by the newly-hired certified employee.

(b) (No change.)

§9.52. Training and Continuing Education Courses.

(a) - (f) (No change.)

(g) Advanced field training (AFT). Some classes may include AFT in addition to the classroom hours, during which class attendees shall perform LP-gas activities. AFT shall be properly completed within 30 calendar days of attending the class. All qualification tasks included in the AFT shall be completed. The AFT materials, including the qualification checklist and the certification page, shall be readily available at the licensee's Texas business location for review by an authorized Commission representative during normal business hours.

(1) - (2) (No change.)

(3) Individuals who attend the 80-hour Category E management-level class or the 16-hour Category F, G, I, and [~~or~~] J management-level class shall perform any required AFT activities during the class.

(4) (No change.)

(5) A certified individual is exempt from the AFT requirement of a continuing education course if the individual has previously completed that same course, including the AFT.

(h) Available courses. Training and continuing education courses and other information are shown in Tables 1 through 4 of this subsection. Items on the tables marked with an "x" indicate courses that meet training or continuing education requirements for management-level or employee-level certificate holders in that category.
Figure: 16 TAC §9.52(h)

(i) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 14, 2006.

TRD-200606193
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Earliest possible date of adoption: December 31, 2006
For further information, please call: (512) 475-1295

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CHAPTER 20. ADMINISTRATION
SUBCHAPTER B. ACCESS TO AND CHARGES FOR RECORDS

16 TAC §20.101

The Railroad Commission of Texas (Commission) proposes amendments to §20.101, relating to Access to and Charges for Commission Records. The Commission proposes the amendments pursuant to Senate Bill 452 and Senate Bill 727, 79th Legislature, 2005, which transferred the duties of the Texas Building and Procurement Commission (TBPC) under the public information law to the Office of the Attorney General (OAG). The TBPC rules regulating charges for copies of public information are currently located in Title 1, Part 5, Chapter 111, Subchapter C, of the Texas Administrative Code. These rules are transferred to the OAG and reorganized under Title 1, Part 3, Chapter 70, of the Texas Administrative Code effective September 1, 2005, as published in the September 29, 2006, issue of the *Texas Register* (31 TexReg 8251). The proposed amendments to §20.101 add the OAG rule numbers. The adopted or amended dates in subsection (a)(1) through (11) remain in effect.

Rebecca Trevino, Director, Administration Division, has determined that for each year of the first five years the amendments are in effect there will be no fiscal implications to state or local governments as a result of the amendments. The public benefit anticipated as a result of the amendments will be that the Commission's rules will accurately state the basis on which the Commission charges for copies of public information. There is no anticipated economic cost for small businesses, micro-businesses, or individuals required to comply with the amendments.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.html; or by electronic mail to rulescoordinator@rrc.state.tx.us. The Commission will accept comments for 30 days after publication in the *Texas Register*. The Commission encourages all interested persons to submit comments no later than 5:00 p.m. on Tuesday, January 2, 2007. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Ms. Kellie Martinec at (512) 475-1295. The status of Commission rulemakings in progress is available at www.rrc.state.tx.us/rules/proposed.html.

The Commission proposes the amendments under Texas Government Code, §§2161.003, which requires the Commission to adopt the rules of the Texas Building and Procurement Commission promulgated under Texas Government Code, §§2161.002, as the Commission's own rules; and Texas Civil Statutes, Article 6447, which authorizes the commissioners to make all rules necessary for their government and proceedings.

Statutory authority: Texas Government Code, §§2161.003 and Chapters 2155, 2158, 2161, 2162, 2166, 2252, and 2254; and Texas Civil Statutes, Article 6447.

Cross-reference to statute: Texas Government Code, §§2161.003 and Texas Civil Statutes, Article 6447.

Issued in Austin, Texas on November 14, 2006.

§20.101. Access to and Charges for Commission Records.

(a) The Commission adopts by reference the rules of the Office of the Attorney General in 1 TAC, Part 3, Chapter 70, relating to Cost of Copies of Public Information (formerly Texas Building and Procurement Commission in 1 TAC Chapter 111, Subchapter C, concerning cost of copies of public information). These rules were transferred from TBPC to the OAG effective September 1, 2005. The adopted or amended dates in paragraphs (1) through (11) of this subsection remain in effect. [~~, as effective on the following dates:~~]

(1) §70.1 (formerly §111.61), Purpose, amended effective February 11, 2004;

(2) §70.2 (formerly §111.62), Definitions, amended effective February 11, 2004;

(3) §70.3 (formerly §111.63), Charges for Providing Copies of Public Information, amended effective February 11, 2004;

(4) §70.4 (formerly §111.64), Requesting an Exemption, amended effective January 16, 2003;

(5) §70.5 (formerly §111.65), Access to Information Where Copies Are Not Requested, amended effective February 11, 2004;

(6) §70.6 (formerly §111.66), Format for Copies of Public Information, adopted effective September 18, 1996;

(7) §70.7 (formerly §111.67), Estimates and Waivers of Public Information Charges, amended effective February 11, 2004;

(8) §70.8 (formerly §111.68), Processing Complaints of Overcharges, amended effective February 11, 2004;

(9) §70.9 (formerly §111.69), Examples of Charges for Copies of Public Information, amended effective February 11, 2004;

(10) §70.10 (formerly §111.70), The Texas Building and Procurement Commission Charge Schedule, amended effective February 11, 2004; and

(11) §70.11 (formerly §111.71), Informing the Public of Basic Rights and Responsibilities under the Public Information Act, amended effective February 11, 2004.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 14, 2006.

TRD-200606191
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Earliest possible date of adoption: December 31, 2006
For further information, please call: (512) 475-1295

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TITLE 22. EXAMINING BOARDS

PART 5. STATE BOARD OF DENTAL EXAMINERS

CHAPTER 104. CONTINUING EDUCATION

22 TAC §104.1

The Texas State Board of Dental Examiners (Board) proposes an amendment to §104.1, concerning continuing education requirements for licensees. The section is amended to update the jurisprudence requirement.

Specifically, the proposed language would require a licensee to complete either the jurisprudence assessment or three hours of jurisprudence continuing education every three years. After January 1, 2008, only the jurisprudence assessment will fulfill the requirement.

Dr. Jim Zukowski, Executive Director of the Texas State Board of Dental Examiners, has determined that for each year of the first five-year period the section is in effect, there will be limited fiscal implications for local or state government as a result of enforcing or administering the section.

There is an anticipated economic cost to persons who are required to comply with the section as proposed, arising from the cost of required courses and assessments, and incidental costs. There is no anticipated local employment impact as a result of enforcing the sections as proposed.

Dr. Zukowski has determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcement will be the improvement in the education, capabilities, and regulation of dental licensees.

The fiscal implications for small or large businesses will be minimal or none at all. Therefore, the Board has determined that compliance with the proposed section will not have an adverse economic impact on small businesses when compared to large businesses. The requirements of this section will impact individuals who are active licensees, and would only impact small businesses who choose to pay course registration and assessment fees for their dental licensee employees.

Comments on the proposal may be submitted to Dr. Jim Zukowski, Executive Director, Texas State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, or by fax at (512) 463-7452. To be considered, all written comments must be received by the Texas State Board of Dental Examiners no later than 30 days from the date that this amended section is published in the *Texas Register.*

The amendment is proposed under Texas Government Code §2001.021 et seq., and Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The proposed amendment affects Title 3, Subtitle D of the Occupations Code and Title 22, Texas Administrative Code, Chapters 101 - 125.

§104.1. Requirement.

As a prerequisite to the annual renewal of a dental or dental hygiene license, proof of completion of 12 hours of acceptable continuing education is required.

(1) - (2) (No change.)

(3) Effective January 1, 2005 through December 31, 2007, each licensee shall complete either the jurisprudence assessment OR three (3) hours of approved coursework in jurisprudence every three (3) years, in addition to the general 12 hour requirement.

(A) - (B) (No change.)

(C) Effective January 1, 2008, the jurisprudence requirement may only be met by taking the jurisprudence assessment once every three years.

(4) - (10) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2006.

TRD-200606244
Jim Zukowski, Ed.D.
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: December 31, 2006
For further information, please call: (512) 475-0972

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CHAPTER 114. EXTENSION OF DUTIES OF AUXILIARY PERSONNEL--DENTAL ASSISTANTS

22 TAC §114.4

The Texas State Board of Dental Examiners (Board) proposes new §114.4, concerning certification for monitoring the administration of nitrous oxide. The new section is proposed to update the requirements that dental assistants must complete to become certified to monitor the administration of nitrous oxide.

Specifically, the proposed language would require a dental assistant be certified in order to be delegated the task of monitoring the administration of nitrous oxide.

Dr. Jim Zukowski, Executive Director of the Texas State Board of Dental Examiners, has determined that for each year of the first five-year period the section is in effect, there will be limited fiscal implications for local or state government as a result of enforcing or administering the section.

There is an anticipated economic cost to persons who are required to comply with the section as proposed, arising from the cost of required courses and examinations, and incidental costs. There is no anticipated local employment impact as a result of enforcing the sections as proposed.

Dr. Zukowski has determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcement will be the improvement in the education, capabilities, and regulation of dental assistants who monitor the administration of nitrous oxide on patients in the State of Texas.

The fiscal implications for small or large businesses will be minimal or none at all. Therefore, the Board has determined that compliance with the proposed section will not have an adverse economic impact on small businesses when compared to large businesses. The requirements of this section will impact individuals who make application for certification, and would only impact small businesses who choose to pay course registration and examination fees for their dental assistant employees.

Comments on the proposal may be submitted to Dr. Jim Zukowski, Executive Director, Texas State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, or by fax at (512) 463-7452. To be considered, all written comments must be received by the Texas State Board of Dental Examiners no later than 30 days from the date that this amended section is published in the *Texas Register.*

The new section is proposed under Texas Government Code §2001.021 et seq., and Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The proposed new section affects Title 3, Subtitle D of the Occupations Code and Title 22, Texas Administrative Code, Chapters 101 - 125.

§114.4. Monitoring the Administration of Nitrous Oxide.

(a) The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise:

(1) "Dental industry professional organization"--any organization, the primary mission of which is to represent and support dentists, dental hygienists, and/or dental assistants;

(2) "Didactic education" requires the presentation and instruction of theory and scientific principles.

(3) "Direct Supervision" requires that the dentist responsible for the procedure shall be physically present during patient care and shall be aware of the patient's physical status and well-being.

(b) A Texas-licensed dentist may delegate the monitoring of the administration of nitrous oxide to a dental assistant, if the dental assistant:

(1) works under the direct supervision of the licensed dentist; and

(2) is certified pursuant to subsection (c) of this section.

(c) A dental assistant wishing to obtain certification under this section must:

(1) Pay an application fee set by board rule; and

(2) On a form prescribed by the board, provide proof that the applicant has:

(A) Successfully completed a current course in basic life support; and,

(B) Completed a minimum of 8 hours of didactic education and testing in monitoring the administration of nitrous oxide taken through a CODA-accredited dental, dental hygiene or dental assisting program, approved by the board, whose course of instruction includes:

(i) Texas Jurisprudence, including but not limited to: anesthesia standard of care, anesthesia/analgesia, enteral conscious sedation, and this rule, regarding monitoring the administration of nitrous oxide;

(ii) Dental anatomy and physiology;

(iii) Pharmacology;

(iv) Sedation equipment;

(v) Infection control;

(vi) Patient monitoring; and

(vii) Recognition and management of medical emergencies.

(d) The jurisprudence assessment may be completed to satisfy the requirements set out in subsection (c)(2)(B)(i) of this section.

(e) A program seeking to offer a course in monitoring the administration of nitrous oxide must submit a written request for approval to the board demonstrating that it meets the requirements set forth in subsection (c)(2)(B) of this section. Additionally, all courses must include a mandatory competency evaluation with a minimum of 50 test items. Course documentation must be maintained by the course provider for no less than three years.

(f) Approved courses may be offered at annual meetings of dental industry professional organizations.

(g) Courses taken to satisfy the requirements of this section are valid for five (5) years from the date of course completion for certification purposes.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2006.

TRD-200606243
Jim Zukowski, Ed.D.
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: December 31, 2006
For further information, please call: (512) 475-0972

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CHAPTER 115. EXTENSION OF DUTIES OF AUXILIARY PERSONNEL--DENTAL HYGIENE

22 TAC §115.2

The Texas State Board of Dental Examiners (Board) proposes an amendment to §115.2, concerning certification for monitoring the administration of nitrous oxide. The section is amended to update the requirements that dental hygienists must complete to become certified to monitor the administration of nitrous oxide.

Specifically, the proposed language would require a dental hygienist to take a board-approved course in order to be certified to monitor the administration of nitrous oxide.

Dr. Jim Zukowski, Executive Director of the Texas State Board of Dental Examiners, has determined that for each year of the first five-year period the section is in effect, there will be limited fiscal implications for local or state government as a result of enforcing or administering the section.

There is an anticipated economic cost to persons who are required to comply with the section as proposed, arising from the cost of required courses and examinations, and incidental costs. There is no anticipated local employment impact as a result of enforcing the sections as proposed.

Dr. Zukowski has determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcement will be the improvement in the education, capabilities, and regulation of dental hygienists who monitor the administration of nitrous oxide on patients in the State of Texas.

The fiscal implications for small or large businesses will be minimal or none at all. Therefore, the Board has determined that compliance with the proposed section will not have an adverse economic impact on small businesses when compared to large businesses. The requirements of this section will impact individuals who make application for certification, and would only impact small businesses who choose to pay course registration and examination fees for their dental assistant employees.

Comments on the proposal may be submitted to Dr. Jim Zukowski, Executive Director, Texas State Board of Dental Examiners, 333 Guadalupe, Tower 3, Suite 800, Austin, Texas 78701, or by fax at (512) 463-7452. To be considered, all written comments must be received by the Texas State Board of Dental Examiners no later than 30 days from the date that this amended section is published in the *Texas Register.*

The amendment is proposed under Texas Government Code §2001.021 et seq., and Texas Occupations Code §254.001, which provides the Board with the authority to adopt and enforce rules necessary for it to perform its duties.

The proposed amendment affects Title 3, Subtitle D of the Occupations Code and Title 22, Texas Administrative Code, Chapters 101 - 125.

§115.2. Permitted Duties.

In addition to those duties identified in the Texas Occupations Code, Section 262.152, a dental hygienist may perform the following services and procedures in the dental office of his/her supervising dentist or dentists who are legally engaged in the practice of dentistry in this state or under the supervision of a supervising dentist in an alternate setting.

(1) (No change.)

(2) monitor patients receiving nitrous oxide/oxygen inhalation conscious sedation only after obtaining certification issued by the State Board of Dental Examiners and only under the direct supervision of a Texas licensed dentist. Certification may be obtained by successful completion of a board-approved course, that includes examination, on the monitoring of the administration of nitrous oxide [~~the certification examination offered by the State Board of Dental Examiners~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2006.

TRD-200606242
Jim Zukowski, Ed.D.
Executive Director
State Board of Dental Examiners
Earliest possible date of adoption: December 31, 2006
For further information, please call: (512) 475-0972

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PART 14. TEXAS OPTOMETRY BOARD

CHAPTER 280. THERAPEUTIC OPTOMETRY

22 TAC §280.7

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Optometry Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Optometry Board proposes the repeal of §280.7. The rule concerns the Optometric Health Care Advisory Committee, which was abolished by operation of §351.165 of the Optometry Act on September 1, 2005.

Chris Kloeris, executive director of the Texas Optometry Board, has determined that, for the first five-year period the proposed repeal of the rule is in effect, there will be no fiscal implications for state and local governments as a result of enforcing or administering the rule.

Chris Kloeris also has determined that, for each of the first five years the proposed repeal of the rule is in effect, the public benefits anticipated is that the Administrative Code will not contain obsolete provisions. No costs are associated with the repeal of this rule, including small and micro businesses.

Comments on the proposal may be submitted to Chris Kloeris, Executive Director, Texas Optometry Board, 333 Guadalupe Street, Suite 2-420, Austin, Texas 78701-3942. The deadline for furnishing comments is thirty days after publication in the *Texas Register*.

The repeal of §280.7 is proposed under the Texas Optometry Act, Texas Occupations Code, §351.151 and §351.165. No other sections are affected by this repeal.

The Texas Optometry Board interprets §351.151 as authorizing the adoption of procedural and substantive rules for the regulation of the optometric profession. The Board interprets §351.165 as creating the Optometric Health Care Advisory Committee and setting a date of September 1, 2005, to abolish the Committee.

§280.7. Optometric Health Care Advisory Committee.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 15, 2006.

TRD-200606230
Chris Kloeris
Executive Director
Texas Optometry Board
Earliest possible date of adoption: December 31, 2006
For further information, please call: (512) 305-8502

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 37. MATERNAL AND INFANT HEALTH SERVICES

SUBCHAPTER S. NEWBORN HEARING SCREENING

25 TAC §§37.501 - 37.512

The Executive Commissioner of the Health and Human Services Commission, on behalf of the Department of State Health Services (department), proposes amendments to §§37.501 - 37.512, concerning the Newborn Hearing Screening Program.

BACKGROUND AND PURPOSE

The sections were adopted in May 2000, to implement Health and Safety Code, Chapter 47. Birthing facilities subject to Health and Safety Code, Chapter 47, have been operating since September 2001, and are currently providing screening for 98 percent of all births in the state.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 37.501 - 37.512 have been reviewed, and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

Section 37.501 has been amended to simplify and increase the readability of the text.

Section 37.502(3) has been amended to incorporate the department's current name. Section 37.502(4) has been amended because the 79th Texas Legislature changed the name of the "Texas State Board of Physician Assistant Examiners" to the "Texas Physician Assistant Board." Section 37.502(9) has been amended because the 79th Texas Legislature changed the name of the "Texas State Board of Medical Examiners" to the "Texas Medical Board."

Section 37.503(g) has been amended to change the name of the "Interagency Council on Early Childhood Intervention" to "Early Childhood Intervention Services" and to clarify that the reference "§621.45 of this title (relating to Primary Referral Requirements)" was transferred to 40 TAC §108.61, effective March 1, 2004. Section 37.503(g) has also been amended to require that facilities refer infants with confirmed or suspected hearing loss to Early Childhood Intervention, either directly or through the department. Section 37.503(h) has been amended to clarify how facilities that are not subject to Health and Safety Code, Chapter 47, and that did not accept an equipment grant from the department must refer newborns delivered at those facilities to other participating facilities and enter necessary data concerning the referral facility into the system. New §37.503(i) requires facilities that are not required to screen newborns for hearing loss but choose to do so, to notify the department and comply with all applicable certification requirements.

Section 37.504(5) has been amended to change the name of the "Interagency Council on Early Childhood Intervention" to "Early Childhood Intervention Services" and to clarify that follow-up as well as screening results must be reported to the department.

Section 37.505(b) has been amended to increase the clarity of the section.

New subparagraphs (C) in §37.506(a)(2) and (3) have been added to clarify that during both Standard and Distinguished certification review, programs will retain their then-current certifications. Existing subparagraphs (C) in §37.506(a)(2) and (3) have been relettered to §37.506(a)(2)(D) and (3)(D), respectively. Section 37.506(d) has been deleted because the option is outdated and no longer relevant to the administration of the newborn hearing screening program. Subsections (e) and (f) have been relettered as (d) and (e), respectively.

Section 37.507(b) has been amended to increase the clarity of the section.

Section 37.508 has been amended to clarify that birthing facilities that operate certified newborn hearing screening programs may request needed technical assistance and training.

Section 37.509(c) has been deleted, thereby requiring all birthing facilities subject to Health and Safety Code, Chapter 47, to utilize information management, reporting, and tracking software provided by the department. With the deletion of §37.509(c), §37.509(d) has been relettered as §37.509(c) and the word "hospitals" has been deleted and added to new §37.509(e) to clarify the responsibility of hospitals for follow-up referrals. New §37.509(d) clarifies the responsibilities of hearing professionals concerning referrals of infants with late onset hearing loss.

The title of §37.510 has been amended to increase clarity and readability.

Section 37.511(b) has been amended to clarify that the Interagency Council on Early Childhood Intervention now functions as Early Childhood Intervention Services, a part of the Department of Assistive and Rehabilitative Services. Additionally, §37.511(b) has been amended because §621.45 of this title (relating to Primary Referral Requirements) was transferred to 40 TAC §108.61, effective March 1, 2004. Section 37.511(d) has also been amended to reflect the current name of the department and the program.

Section 37.512(d) has been deleted because it refers to the initiation of newborn hearing screening at certain birthing facilities as mandated by Health and Safety Code, Chapter 47, not later than 2001.

FISCAL NOTE

Jann Melton-Kissel, Section Director, Specialized Health Services, has determined that for each of the first five years the sections are in effect, there will be no fiscal implications to state or local governments as a result of administering the sections as proposed. The proposed amendments do not require state or local governments that operate birthing facilities to change their business practices in order to provide data to the department, and no birthing facilities will be required to purchase computer software or to pay for staff training in order to do so.

SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

Ms. Melton-Kissel has determined that there will be no effect on small businesses or micro-businesses required to comply with the sections as proposed, because neither small businesses nor micro-businesses that are subject to Health and Safety Code, Chapter 47, will be required to change their business practices in order to provide data to the department, and no birthing facilities will be required to purchase computer software or to obtain staff training in order to do so. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

Ms. Melton-Kissel has determined that the public benefit anticipated as a result of amending the sections is the ability to better ensure follow-up services for newborns and infants with hearing loss.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed sections do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to David R. Martinez, Newborn Screening Branch, Mail Code 1918, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

PUBLIC HEARING

In addition, a public hearing to receive comments on the proposal is scheduled for Thursday, December 7, 2006, from 10:00 a.m. to 12:00 noon at the Department of State Health Services, Room K-100, 1100 West 49th Street, Austin, Texas 78756. Contact: David R. Martinez at (512) 458-2216.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Cathy Campbell, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The proposed amendments are authorized by Health and Safety Code, §§47.004(d), 47.008(c), and 1001.075; and by Government Code, §531.0055, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

The proposed amendments affect Government Code, Chapter 531, and Health and Safety Code, Chapters 47 and 1001. Review of the sections implements Government Code, §2001.039.

§37.501. Purpose.

These [~~The purpose of these sections is to establish the~~] rules implement [~~for the implementation of~~] a statewide newborn hearing screening, tracking, and intervention program.

§37.502. Definitions.

The following words and terms pertain explicitly to this chapter and shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (2) (No change.)

(3) Department--The Department of State Health Services [~~Texas Department of Health~~], 1100 West 49th Street, Austin, Texas 78756.

(4) Health care provider--A registered nurse recognized as an advanced practice nurse by the Board of Nurse Examiners or a physician assistant licensed by the Texas Physician Assistant Board [~~Texas State Board of Physician Assistant Examiners~~].

(5) - (8) (No change.)

(9) Physician--A person licensed to practice medicine by the Texas Medical Board [~~Texas State Board of Medical Examiners~~].

(10) - (15) (No change.)

§37.503. Newborn Hearing Screening, Tracking, and Intervention Program.

(a) - (f) (No change.)

(g) Program protocols shall require appropriate referrals to Early Childhood Intervention Services (ECI), Department of Assistive and Rehabilitative Services, [~~the Interagency Council on Early Childhood Intervention~~] as required by 40 Texas Administrative Code, §108.61 [~~§621.45 of this title~~] (relating to Primary Referral Requirements). Programs that offer outpatient screening or audiologic assessment services shall refer an infant with confirmed or suspected hearing loss to ECI by entering this information into the infant's record in the department's hearing screening system so that the form is electronically completed and sent to ECI. Providers outside birth facility programs may enter the information into the department's hearing screening system, mail the form, send it by facsimile, or call the local ECI office regarding referral.

(h) If a birthing facility is not required by Health and Safety Code, Chapter 47, to offer newborn hearing screening, and did not [~~has chosen not to~~] accept an equipment grant from the department to conduct newborn hearing screening, the facility must refer the parents of each newborn delivered in the facility to another birthing facility which offers newborn hearing screening, by using the data system provided by the department and entering the necessary data, including the name of the referral facility into the system.

(i) A birthing facility not required by Health and Safety Code, §47.003(a), to offer newborn hearing screening that nevertheless elects to do so must notify the department and comply with all applicable certification requirements.

§37.504. Certification of Screening Programs.

Program certification criteria shall include the following:

(1) - (4) (No change.)

(5) communicating with parents, physicians or health care providers, the department, and Early Childhood Intervention Services [~~the Interagency Council on Early Childhood Intervention~~] with appropriate procedures for reporting screening and follow-up results and providing information to parents regarding follow-up services;

(6) - (8) (No change.)

§37.505. Program Performance Standards and Goals.

(a) (No change.)

(b) Goals for program performance shall include:

(1) - (4) (No change.)

§37.506. Program Certification.

(a) The department shall certify programs in the following classifications.

(1) (No change.)

(2) Standard.

(A) - (B) (No change.)

(C) A program maintains its designated certification during certification review.

(D) [~~(C)~~] A program holding standard certification may be awarded Provisional, Standard, or Distinguished status, or may be decertified.

(3) Distinguished.

(A) - (B) (No change.)

(C) A program maintains its designated certification during certification review.

(D) [~~(C)~~] A program holding distinguished certification may be awarded Provisional, Standard, or Distinguished status, or may be decertified.

(4) (No change.)

(b) - (c) (No change.)

[~~(d) Certification For Operational Programs. Hospitals that were providing newborn hearing screening to all newborns on September 1,1999, may be awarded Standard or Distinguished certification based upon compliance with §37.505(a) or §37.505(b) of this title.~~]

(d) [~~(e)~~] Notice of Failure to Meet Performance Standards. The department or the department's designee shall notify in writing any certified program which fails to meet applicable performance standards during any two-month period.

(1) A program notified of failure to meet performance standards shall provide to the department or the department's designee within 30 days of receipt of the notice a corrective action plan and the time frame needed to return the program to compliance.

(2) Failure by the program to provide a written corrective action plan within 30 days may result in an immediate certification review.

(e) [~~(f)~~] Fees. No fees shall be charged for certification or re-certification.

§37.507. Information Concerning Screening Results and Follow-up Care.

(a) (No change.)

(b) Birthing facilities shall [~~must~~] provide information recommended by the department to the parents regarding available follow-up services for newborns and infants with abnormal screening results.

§37.508. Training and Technical Assistance by Department.

The department or its designee will provide training and technical assistance associated with the implementation or maintenance of a certified program upon request.

§37.509. Information Management, Reporting, and Tracking System.

(a) - (b) (No change.)

[~~(c) Birthing facilities which, on September 1, 1999, were offering newborn hearing screening to all newborns utilizing information management, reporting, and tracking software not provided by the department, or that do not participate in the medical assistance program shall cooperate with the department's designee to report screening information to the department in a format and according to a time frame specified by the department.~~]

(c) [~~(d)~~] Audiologists, [~~Hospitals, audiologists,~~] qualified hearing screening providers, intervention specialists, educators, and others who receive referrals from programs under this chapter shall either provide the needed services or refer the children to another provider of the needed services, and with consent shall provide the following information[~~, where available,~~] to the department or its designee:

(1) results of follow-up care;

(2) results of audiologic testing of infants identified with hearing loss;

(3) reports on initiation of intervention services; and

(4) results of follow-up and testing on children served under the state's medical assistance program under Human Resources Code, Chapter 32, who are eligible for services and hearing aids through the department's Program for Amplification for Children of Texas.

(d) Audiologists, qualified hearing screening providers, intervention specialists, educators, and others who provide services to infants who are diagnosed with hearing loss shall provide the following information, with consent, to the department or its designee:

(1) results of follow-up services;

(2) results of audiologic testing of infants identified with hearing loss;

(3) report on initiation of intervention services; and

(4) results of follow-up and testing on children served under the state's medical assistance program under Human Resources Code, Chapter 32, who are eligible for services and hearing aids

through the department's Program for Amplification for Children of Texas.

(e) Hospitals that provide services under this chapter shall use the information management, reporting and tracking software provided by the department to report, with consent, the following information to the department or its designee:

(1) results of all follow-up services for infants who do not pass the birth admission screen when the hospital provides the follow-up services; or

(2) the name of the provider or facility where the hospital refers the family for follow-up services.

§37.510. Responsibilities of the Department of State Health Services [~~Texas Department of Health Responsibilities~~].

(a) - (b) (No change.)

§37.511. Confidentiality and General Access to Data.

(a) (No change.)

(b) All primary referral sources identified in 40 Texas Administrative Code, §108.61 [~~§621.45 of this title~~] (relating to Primary Referral Requirements) shall provide information concerning children suspected of [~~diagnosed with~~] hearing loss to Early Childhood Intervention Services, Department of Assistive and Rehabilitative Services [~~the Interagency Council on Early Childhood Intervention~~].

(c) (No change.)

(d) At any time a parent may request in writing that individually identifying information concerning his or her child be removed from the department's newborn hearing screening system by contacting the Department of State Health Services, Newborn Screening Branch [~~Texas Department of Health, Audiology Services Program~~], 1100 West 49th Street, Austin, Texas, 78756. The department shall act on any request in a timely manner.

(e) - (g) (No change.)

§37.512. Authorized Medicaid Newborn Hearing Services.

(a) - (c) (No change.)

[~~(d) A Medicaid birthing facility described in §37.502(2)(A) or (B) of this title (relating to Definitions) shall implement its newborn hearing screening program by the dates required by Chapter 1347, §6, Acts of the 76th Legislature, 1999 (HB 714).~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 20, 2006.

TRD-200606299
Cathy Campbell
General Counsel
Department of State Health Services
Earliest possible date of adoption: December 31, 2006
For further information, please call: (512) 458-7111 x6972

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 11. CONTRACTS

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §§11.1 - 11.3, and 11.200.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

Certain Texas Building and Procurement Commission (TBPC) rules require that agencies adopt them by reference. Since TBPC has amended some of its rules, the adoptions in the TCEQ rules are being updated. Also, the names of agencies referenced in the rules have changed; therefore, the names are being updated. Several clarifications are being made to better organize and more thoroughly explain the rules. Several typographical errors are being corrected.

Also, the 77th Legislature, 2001, passed House Bill (HB) 2812. The bill renumbered Chapter 2259 to Chapter 2261. This proposed rulemaking is necessary to update the reference to the chapter and sections of the statutes.

SECTION BY SECTION DISCUSSION

The commission is making administrative changes to §11.1 to change references to the Texas Natural Resource Conservation Commission to the Texas Commission on Environmental Quality and references to the Texas General Services Commission to the Texas Building and Procurement Commission. A reference to the issue date of a TBPC rule is also being updated to reference the most recent amendment of the rule.

The commission is clarifying in §11.2(a) who can file a protest by adding "proposer" to the list. Also, the phrase "or his designee (hereafter Manager)" is being moved for clarity. The commission is making subsection (e)(3) parallel to subsection (e)(2) by explaining that the Procurements and Contracts Manager will include in its letter the appropriate remedial action. A typographical error is being corrected in subsection (g) with the removal of the word "either." Subsection (h) is being deleted and reinserted as subsection (i) and subsection (i) is being relettered as subsection (h) to improve the logical order of the subsections. In the new subsection (h), a phrase is being moved to improve clarity, "in writing by the executive director" and a phrase that does not coincide with the rest of the rule is being removed, "either by the commission."

In §11.200, the commission is updating the reference to Texas Government Code, Chapter 2259, and a related statute, to Chapter 2261.

The commission is making administrative changes to §11.3 to change references to the Texas Natural Resource Conservation Commission to the Texas Commission on Environmental Quality in subsection (c) and a reference to the Texas General Services Commission to the Texas Building and Procurement Commission in subsection (a). Also in subsection (a), a reference to the issue date of a TBPC rule is being updated to reference the most recent amendment of the rule and the subject of the referenced rule is clarified.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment Section, has determined that, for the first five-year period the proposed rules are in effect, no fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules.

The proposed rules would revise 30 Texas Administrative Code (TAC) Chapter 11 and adopt by reference legislative changes made during the 77th Legislative Session to the rules of the Texas Building and Procurement Commission into the rules of the Texas Commission of Environmental Quality. The proposed rules would also update references, provide for more logical organization of the chapter, and correct typographical errors as needed. The proposed changes are administrative in nature and will have no fiscal implication on local governments, individuals, or businesses.

PUBLIC BENEFITS AND COSTS

Ms. Chamness also determined that, for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be that the rules are easier to understand and are more current in the implementation of state purchasing requirements.

There are no anticipated fiscal implications for large businesses or individuals as a result of the proposed rules.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rules.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in the act. The intent of the rule is to update agency names and references to rules, provide for more logical sequencing of phrases and subsections in the rules, and to clarify who the rules apply to and the contents of a letter from the Manager of Procurements and Contracts. The changes are not expressly to protect the environment and reduce risks to human health and the environment. The commission invites public comment on the draft regulatory impact analysis determination.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed an assessment of whether these proposed rules constitute a takings under Texas Government Code, Chapter 2007. The specific purpose of these proposed rules is to update agency names and references to rules, provide for more logical sequencing of phrases and subsections in the rules, and to clarify who the rules apply to and the contents of a letter from the Manager of Procurements and Contracts. The proposed rules will substantially advance this stated purpose.

Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally) nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations.

There are no burdens imposed on private real property, and the benefits to society are greater clarification of the rule.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the proposed rules are not subject to the Texas Coastal Management Program.

SUBMITTAL OF COMMENTS

Comments may be submitted to Holly Vierk, MC 205, Texas Register Team, Office of Legal Services, P.O. Box 13087, Austin, Texas 78711-3087 or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments/*. All comments should reference Rule Project Number 2006-042-011-AD. The comment period closes January 2, 2007. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Joe McGill, Procurements and Contracts Section, at (512) 239-1813.

SUBCHAPTER A. HISTORICALLY UNDERUTILIZED BUSINESS PROGRAM

30 TAC §11.1

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.103(a), which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

The proposed amendment implements TWC, §5.103(a), which provides that the commission has the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

§11.1. Historically Underutilized Business Program.

The commission adopts by reference the rules of the Texas Building and Procurement Commission [~~Texas General Services Commission~~] in 1 TAC §§111.11 - 111.22 [~~111.23~~] and §§111.26 - 111.28 (relating to Historically Underutilized Business Program), as amended through the November 9, 2004, issue of the *Texas Register* (29 TexReg 10249). [~~June 9, 2000, issue of the *Texas Register* (25 TexReg 5621).~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 17, 2006.

TRD-200606250

Kevin McCalla
Director, General Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 31, 2006
For further information, please call: (512) 239-0177

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SUBCHAPTER B. PROTEST PROCEDURES FOR VENDORS

30 TAC §11.2

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103(a), which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

The proposed amendment implements TWC, §5.103(a), which provides that the commission has the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

§11.2. Protest Procedures for Vendors.

(a) Any actual or prospective bidder, offeror, proposer, or contractor who is aggrieved in connection with the solicitation, evaluation, or award of a contract may formally protest to the Procurements and Contracts Manager [~~or his designee (hereafter Manager)~~] of the commission or his designee (hereafter Manager). Such protests must be in writing and received in the Procurements and Contracts Section within ten working days after such aggrieved person knows, or should have known, of the occurrence of the action which is protested. Formal protests must conform to the requirements of this subsection and subsection (c) of this section, and shall be resolved in accordance with the procedure set forth in subsections (d) and (e) of this section. Copies of the protest must be mailed or delivered by the protesting person to the project manager, if any, and other interested persons. For the purposes of this section, "interested persons" means all vendors who have submitted bids or proposals for the contract involved.

(b) - (d) (No change.)

(e) If the protest is not resolved by mutual agreement, the Manager will issue a written determination on the protest.

(1) - (2) (No change.)

(3) If the Manager determines that a violation of the rules or statutes has occurred in a case where a contract has been awarded, he or she shall inform the protesting person and other interested persons by letter which sets forth the reasons for the determination, and the appropriate remedial action, which may include ordering the contract void.

(f) (No change.)

(g) The executive director shall [~~either~~] issue a final determination on the protest within 15 days after receipt of the aggrieved person's request for reconsideration.

(h) A decision issued in writing by the executive director in response to a request for reconsideration shall be the final administrative action of the commission.

[~~(h) Unless good cause for delay is shown or the Manager or executive director determines that a protest or appeal raises issues significant to procurement practices or procedures, a protest or appeal that is not filed timely will not be considered.~~]

(i) Unless good cause for delay is shown or the Manager or executive director determines that a protest or appeal raises issues significant to procurement practices or procedures, a protest or appeal that is not filed timely will not be considered.

[~~(i) A decision issued in response to a request for reconsideration, either by the commission, or in writing by the executive director, shall be the final administrative action of the commission.~~]

(j) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 17, 2006.

TRD-200606251
Kevin McCalla
Director, General Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 31, 2006
For further information, please call: (512) 239-0177

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SUBCHAPTER C. BID OPENING AND TABULATION

30 TAC §11.3

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103(a), which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

The proposed amendment implements TWC, §5.103(a), which provides that the commission has the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

§11.3. Bid Opening and Tabulation.

(a) The commission adopts by reference the rules of the Texas Building and Procurement Commission [~~Texas General Services Commission~~] in 1 TAC §113.5(b) (relating to Bid Submission, Bid Opening, and Tabulation), as amended through the September 11, 2000, issue of the *Texas Register* (25 TexReg 8848) [~~effective April 20, 1993~~].

(b) (No change.)

(c) Copies of the rule are filed in the Texas Commission on Environmental Quality's (TCEQ) [~~Texas Natural Resource Conservation Commission's (TNRCC)~~] Library, located at 12100 Park 35 Circle, Building A, Austin, and at all TCEQ [~~TNRCC~~] regional offices.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 17, 2006.

TRD-200606252

Kevin McCalla
Director, General Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 31, 2006
For further information, please call: (512) 239-0177

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SUBCHAPTER E. CONTRACTS MONITORING ROLES AND RESPONSIBILITIES

30 TAC §11.200

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code, §5.103(a), which provides the commission with the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

The proposed amendment implements TWC, §5.103(a), which provides that the commission has the authority to adopt rules necessary to carry out its powers and duties under the TWC and other laws of the state.

§11.200. Applicability.

This subchapter applies only to contracts for goods or services which have been procured by one of the procurement methods described in Texas Government Code, §2261.001 [~~Texas Government Code, §2259.001,~~] as being subject to the requirements of Texas Government Code, Chapter 2261 [~~Chapter 2259~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 17, 2006.

TRD-200606253
Kevin McCalla
Director, General Law Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: December 31, 2006
For further information, please call: (512) 239-0177

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 353. INTRODUCTORY PROVISIONS

SUBCHAPTER H. COLLECTING DELINQUENT OBLIGATIONS

31 TAC §353.122

The Texas Water Development Board (board) proposes an amendment to 31 TAC §353.122 concerning Procedures for Collecting A Delinquent Obligation. Amendment to this section is proposed to correct a clerical error. This rulemaking has been undertaken as a result of the board's review of its rules in 31 TAC Chapter 353, as required by Government Code §2001.039.

The proposed amendment of §353.122(a) corrects a clerical error. Section 353.122 incorrectly references §353.122, rather than §353.121, and is corrected accordingly.

Veronica Hinojosa-Segura, Chief Financial Officer, has determined that for the first five-year period the amendment is in effect, there will not be fiscal implications on state and local government as a result of enforcement and administration of the amended section.

Ms. Hinojosa-Segura has also determined that for the first five years the amendment, as proposed, is in effect, the public benefit anticipated as a result of enforcing the proposed amendment will be the clarification of the amended section. Ms. Hinojosa-Segura has determined there will not be economic costs to small businesses or individuals required to comply with the amendment as proposed.

Comments on the proposal will be accepted for 30 days following publication and may be submitted to Jim Bateman, Attorney, Office of General Counsel, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, or by e-mail to jim.bateman@twdb.state.tx.us or by fax at (512) 463-5580.

The amendment is proposed under the authority of the Texas Water Code §6.101, which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State, and the Texas Government Code, Chapter 2107.

The proposed amendment implements Texas Government Code Chapter 2107 and 1 TAC §59.2 and §59.3.

§353.122. Procedures For Collecting A Delinquent Obligation.

(a) When an obligation has been determined to be delinquent, pursuant to §353.121 [~~§353.122~~] of this title (relating to Procedures For Establishing A Delinquent Obligation), the board shall take the following steps.

(1) - (6) (No change.)

(b) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 15, 2006.

TRD-200606225
Wendall Corrigan Braniff
General Counsel
Texas Water Development Board
Proposed date of adoption: January 17, 2007
For further information, please call: (512) 475-2052

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 3. TEXAS YOUTH COMMISSION

CHAPTER 87. TREATMENT

SUBCHAPTER B. SPECIAL NEEDS OFFENDER PROGRAMS

37 TAC §87.75

The Texas Youth Commission proposes an amendment to §87.75, concerning program services for offenders with mental retardation. The amendment to the section will remove the requirement that updates to a youth's individual case plan be documented monthly. This revision mirrors a recent amendment to §87.1 of this title, which provides for updates to the individual case plan in 30, 60 or 90-day intervals, depending on a youth's classification and restriction level.

Robin McKeever, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment.

DeAnna Lloyd, Chief of Policy Administration, has determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of enforcing the section will be consistency among agency rules. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted within 30 days of the publication of this notice to DeAnna Lloyd, Chief of Policy Administration, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or e-mail to deanna.lloyd@tyc.state.tx.us.

The amendment is proposed under the Human Resources Code, §61.034, which provides the commission with the authority to make rules appropriate to the accomplishment of its functions.

The proposed rule affects the Human Resources Code, §61.034.

§87.75. Program Services for Offenders with Mental Retardation

(a) - (c) (No change.)

(d) Program Requirements. The CRTC will adapt the agency's Resocialization program to enable the progress of youth diagnosed with mental retardation. These adaptations will be documented [~~monthly~~] in the youth's Individual Case Plan [~~(ICP)~~].

(e) Release, Transfer and Transition Options.

(1) - (3) (No change.)

(4) Youth in the CRTC who have completed the initial minimum length of stay and are [~~determined to be~~] unable to progress in the agency's Resocialization Program due to mental retardation in accordance with §87.79 of this title shall be discharged.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 15, 2006.

TRD-200606214

Dwight Harris
Executive Director
Texas Youth Commission
Earliest possible date of adoption: December 31, 2006
For further information, please call: (512) 424-6014

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CHAPTER 111. CONTRACTS
SUBCHAPTER B. CONTRACTS FOR OTHER THAN YOUTH SERVICES

37 TAC §111.31

The Texas Youth Commission proposes an amendment to §111.31, concerning contracting for services. The amendment to the section will remove a redundant provision regarding the threshold at which approval of the deputy executive director is required. Any contract valued at or above $5,000 must be approved by the deputy executive director, regardless of its duration. The provision which requires that contracts with terms exceeding 12 months be approved by the deputy executive director will be removed, as such contracts will generally be valued above the $5,000 threshold.

Robin McKeever, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment.

Paula Castilleja, Chief of Purchasing, has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the elimination of a redundant approval authority requirement. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted within 30 days of the publication of this notice to DeAnna Lloyd, Chief of Policy Administration, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or e-mail to deanna.lloyd@tyc.state.tx.us.

The amendment is proposed under the Human Resources Code, §61.034, which provides the commission with the authority to make rules appropriate to the proper accomplishment of its functions.

The proposed rule affects the Human Resources Code, §61.034.

§111.31. Contracting for Services.

(a) - (d) (No change.)

(e) Approval Authority. Contracts for the delivery of services to the commission, including renewals and amendments, must be approved by agency personnel consistent with total annual costs to the commission.

(1) (No change.)

(2) Contracts of $5,000 or more [~~or for longer than a 12-month duration~~] require prior approval of the deputy executive director.

(3) - (4) (No change.)

(f) - (h) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 15, 2006.

TRD-200606215
Dwight Harris
Executive Director
Texas Youth Commission
Earliest possible date of adoption: December 31, 2006
For further information, please call: (512) 424-6014

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CHAPTER 119. AGREEMENTS WITH OTHER AGENCIES

37 TAC §119.23

The Texas Youth Commission proposes an amendment to §119.23, concerning canteen operations. The amendment to the section will update a reference to another state agency to reflect the recent consolidation of several state agencies.

Robin McKeever, Assistant Deputy Executive Director for Financial Support, has determined that for the first five-year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the amendment.

DeAnna Lloyd, Chief of Policy Administration, has determined that for each year of the first five years the section is in effect the public benefit anticipated as a result of enforcing the section will be the use of current state agency names in the commission's rules. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the amendment as proposed. No private real property rights are affected by adoption of this rule.

Comments on the proposal may be submitted within 30 days of the publication of this notice to DeAnna Lloyd, Chief of Policy Administration, Texas Youth Commission, 4900 North Lamar, P.O. Box 4260, Austin, Texas 78765, or e-mail to deanna.lloyd@tyc.state.tx.us.

The amendment is proposed under the Human Resources Code, §61.034, which provides the commission with the authority to make rules appropriate to the proper accomplishment of its functions.

The proposed rule affects the Human Resources Code, §61.034.

§119.23. Canteen Operations.

(a) Purpose. The purpose of this rule is to provide Texas Youth Commission [~~for TYC~~] operation of canteens on residential facilities [~~campus~~] or contracting for the operation.

(b) - (c) (No change.)

(d) Should the institution choose not to operate its own canteen, the Health and Human Services Commission (HHSC) [~~Texas Commission for the Blind~~] shall have first opportunity to establish a canteen in accordance with Texas Human Resource Code, Chapter 94. Should no canteen be established by the HHSC [~~Texas Commission for the Blind or Texas Rehabilitation Commission~~] licensees under Chapter 94, the institution's advisory council may be awarded a contract to provide canteen services.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 15, 2006.

TRD-200606216
Dwight Harris
Executive Director
Texas Youth Commission
Earliest possible date of adoption: December 31, 2006
For further information, please call: (512) 424-6014

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 20. TEXAS WORKFORCE COMMISSION

CHAPTER 815. UNEMPLOYMENT INSURANCE

The Texas Workforce Commission (Commission) proposes amendments to the following sections of Chapter 815 related to Unemployment Insurance:

Subchapter B, Benefits, Claims, and Appeals, §815.20

Subchapter C, Tax Provisions, §815.107 and §815.109

The Commission proposes the following new sections of Chapter 815 related to Unemployment Insurance:

Subchapter C, Tax Provisions, §815.116, §815.134, and §815.135

Subchapter D, Farm and Ranch Labor, §815.150

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

PART III. IMPACT STATEMENTS

PART IV. COORDINATION ACTIVITIES

PART I. PURPOSE, BACKGROUND, AND AUTHORITY

The purpose of the proposed Chapter 815 rules change is to:

--implement House Bill (HB) 3250, enacted by the 79th Texas Legislature, Regular Session (2005), which amends Title IV of the Texas Labor Code, the Texas Unemployment Compensation Act (TUCA), Chapter 204, Subchapter E, Acquisition of Experience-Rated Employer, by limiting the conditions under which the transfer of Unemployment Insurance (UI) compensation experience between business entities may occur; and requiring the Commission to establish, by rule, procedures to identify the transfer or acquisition of a business for the purposes of identifying State Unemployment Tax Act (SUTA) dumping;

--provide clear direction for UI claimants and employers, without creating an undue bureaucratic burden in navigating the UI and Tax systems; and

--ensure operation of efficient, cost-effective systems that fulfill the requirements of state and federal law.

PART II. EXPLANATION OF INDIVIDUAL PROVISIONS

(Note: Minor, nonsubstantive, editorial changes are made that do not change the meaning of the rules and, therefore, are not discussed in the Explanation of Individual Provisions.)

SUBCHAPTER B. BENEFITS, CLAIMS, AND APPEALS

The Commission proposes amendments to Subchapter B, as follows:

§815.20. Claim for Benefits

Section 815.20 adds Internet filing as a method for unemployed individuals to file UI claims and specifies that the current restrictions to designated hours and days of claim filing do not apply to online initial claim filers or those who request payment of benefits online because the Internet is available 24 hours a day.

SUBCHAPTER C. TAX PROVISIONS

The Commission proposes amendments to Subchapter C, as follows:

§815.107. Reports Required and Their Due Dates

Section 815.107(a) specifies that employers may request, and the Agency may grant, a hardship exemption from filing reports and formats in the required format. The Agency does not intend to implement specific requirements for how the hardship exemption request must be submitted by an employer. The Agency will accept the notification by telephone or in writing, and will develop a system to provide confirmation numbers to employers who request hardship exemptions.

Section 815.107(a)(3)(A)(i) lowers the existing threshold from 250 or more employees to 10 or more employees for employers who must file quarterly benefit wage credit reports on magnetic or electronic media. This rule change is effective July 1, 2007. The Agency will continue ongoing notification initiatives to ensure that entities covered by this new threshold understand that compliance will be required following the effective date of the rule change.

Section 815.107(a)(3)(A)(ii) lowers the existing threshold from 250 or more employees to 10 or more employees for other entities, including agents reporting on behalf of multiple employers, who must file quarterly benefit wage credit reports on magnetic or electronic media. This rule change is effective July 1, 2007. The Agency will continue ongoing notification initiatives to ensure that entities covered by this new threshold understand that compliance will be required following the effective date of the rule change.

Section 815.107(a)(3)(B) lowers the existing threshold from less than 250 employees to less than 10 employees for employers who may file quarterly benefit wage credit reports on magnetic or electronic media. This rule change is effective July 1, 2007. The Agency will continue ongoing notification initiatives to ensure that entities covered by this new threshold understand that compliance will be required following the effective date of the rule change.

New §815.107(a)(3)(D) specifies that a quarterly benefit wage credit report filed in an approved medium shall contain both a wage credit report and a summary report. This rule change is effective July 1, 2007. The Agency will continue ongoing notification initiatives to ensure that entities covered by this new threshold understand that compliance will be required following the effective date of the rule change.

§815.109. Payment of Contributions and Reimbursements

Section 815.109(f) removes the 60-day limit on extensions past the due date for payment of contributions due.

Removal of the 60-day limit on extensions provides the Agency with the flexibility necessary to respond to employers facing extreme circumstances, such as natural disasters, and is consistent with the corresponding extension provisions included in §815.107(b)(3).

Section 815.109(g) requires all agents or other entities making a payment on behalf of an employer to furnish an allocation list on magnetic or electronic media using a format prescribed by the Agency. Currently, agents or other entities making a payment on behalf of 20 or more employers must furnish an allocation list on magnetic or electronic media.

The number of service agents submitting remittance allocation lists for their clients using a paper list has diminished over the years; only a very small number still submit the list in this manner. The most efficient and widely used process, for both the Agency and the service agent, is an electronic submission of the allocation list with the electronic wage reports. This change is consistent with other initiatives to increase use of technology by all customers conducting business with the Agency.

§815.116. Identification and Tracking of Transfers and/or Acquisitions of Businesses

New §815.116 implements the portion of HB 3250 that requires the Commission, by rule, to establish procedures to identify the transfer or acquisition of a business.

New §815.116(a) states that the Agency will employ an electronic method of tracking the reporting of employees and wages to help determine instances of improper reporting by employers.

New §815.116(b) provides that to aid the Agency in its determination, upon request and as determined necessary by the Agency, employers shall provide information sufficient to enable the Agency to determine:

(1) the status of the employing unit under investigation and whether the employer is liable under the Act;

(2) the proper employer of the employees reported and verify whether the wages are reported by the proper entity;

(3) the relationship between the predecessor or successor entity and whether a mandatory transfer of compensation experience is in order; and

(4) the correct calculation of the tax rate assigned to the employer.

§815.134. Employment Status: Employee or Independent Contractor

New §815.134 clarifies that, for the purposes of determining employee or independent contractor status, the Agency shall use the guidelines contained in §821.5 of this title.

§815.135. Voluntary Election by Employers

New §815.135(a) specifies that employers electing coverage under Chapter 206 of TUCA shall make the election in writing on a form specified by the Agency or by a prescribed electronic equivalent.

New §815.135(b) is added to specify that employers electing to pay reimbursements shall make the election in writing on a form

specified by the Agency or by a prescribed electronic equivalent, and in compliance with Chapter 205, Subchapter A, of TUCA.

SUBCHAPTER D. FARM AND RANCH LABOR

The Commission proposes new Subchapter D, as follows:

§815.150. Definition of Terms

New §815.150 defines terms relating to farm and ranch labor when used in implementing TUCA §201.028, §201.047, and §204.009.

New §815.150(1) defines "agricultural association" as a nonprofit or cooperative association of farmers, growers, or ranchers incorporated or qualified under state law, which recruits, solicits, hires, employs, furnishes, or transports migrant or seasonal agricultural workers.

New §815.150(2) defines "agricultural employer" as an individual who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, or nursery or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports migrant or seasonal agricultural workers.

New §815.150(3) defines "farm labor contracting activity" as the recruiting, soliciting, hiring, employing, furnishing, or transporting of migrant or seasonal agricultural workers.

New §815.150(4) defines "farm labor contractor" as an individual, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.

New §815.150(5) defines "farm and ranch labor" as all services performed:

(A) on a farm or ranch in the employ of an individual in connection with cultivating the soil; raising or harvesting an agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur bearing wildlife; or

(B) in the employ of the owner, tenant, or other operator of a farm or ranch, in connection with the operation, management, conservation, improvement, or maintenance of such farm or ranch and its tools and equipment, if the major part of such service is performed on a farm or ranch.

New §815.150(6) defines "labor agent" as an individual in Texas who for a fee offers, attempts to procure, or procures employment for employees; or without a fee offers, attempts to procure, or procures employment for common or agricultural workers; or any individual who for a fee attempts to procure or procures employees for an employer; or without a fee offers or attempts to procure common or agricultural workers for employers; or any individual, regardless of whether a fee is received or due, who offers, attempts to supply, or supplies the services of common or agricultural workers to any individual.

New §815.150(7) defines "migrant worker" as an individual who is employed in farm or ranch labor of a seasonal or temporary nature and who is required to be absent overnight from his or her permanent place of residence, provided the individual is not a temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under 8 U.S.C. §1101(a)(15)(H)(ii)(a) and §1184(c).

New §815.150(8) defines "orchard" as a farm devoted primarily to the planting, cultivating, growing, or harvesting of fruits or nuts.

New §815.150(9) defines "other farm or ranch laborer" as an individual employed in farm or ranch labor or who is neither a seasonal worker nor a migrant worker.

New §815.150(10) defines "seasonal worker" as an individual who is employed in farm or ranch labor of a seasonal or temporary nature and is not required to be absent overnight from his or her permanent place of residence, provided the individual is not a temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under 8 U.S.C. §1101(a)(15)(H)(ii)(a) and §1184 (c).

New §815.150(11) defines "truck farm" as a farm on which fruits, garden vegetables for human consumption, potatoes, sugar beets, or vegetable seeds are produced for market.

New §815.150(12) defines "vineyard" as a farm devoted primarily to the planting, cultivating, growing, or harvesting of grapes.

PART III. IMPACT STATEMENTS

Randy Townsend, Chief Financial Officer, has determined that for each year of the first five years the rules will be in effect, the following statements will apply:

There are no estimated increases in cost to the state and to local governments expected as a result of enforcing or administering the rules.

There is an estimated cost reduction to the Agency of approximately $371,000 per year if all of the employers with between 10 and 250 employees, the new threshold for mandatory electronic submission of reports, submit those reports electronically.

There are no estimated cost reductions to local governments as a result of enforcing or administering the rule

There is an estimated increase in excess of $1 million per year in revenue to the Unemployment Trust Fund as a result of enforcing or administering the rule. The rigorous statutory changes, coupled with the detection system, serve as deterrents to employers engaged in State Unemployment Tax Avoidance (i.e., SUTA dumping).

There are no estimated increases or losses in revenue to local governments as a result of enforcing or administering the rule.

There are no foreseeable implications relating to costs or revenue of the state or local governments as a result of enforcing or administering the rules, aside from those estimated savings to the Agency and those revenues to the Unemployment Trust Fund noted above.

There may be anticipated economic costs to persons required to comply with the rules. It is possible (or likely) that companies employing 10 persons or more already will have the minimum requirements to comply with the rule (e.g., a computer and Internet connectivity) or a contractor perhaps performing accounting, payroll, or reporting functions that has such resources. Therefore, while there may be anticipated economic costs to persons required to comply with the rules, these costs are not estimated to be significant. Section 815.107(a) of the proposed rules provides that the Commission may waive the electronic filing requirements for employers requesting a hardship exemption.

There may be anticipated adverse economic impact on small or microbusinesses as a result of enforcing or administering the rules. As employers requesting a hardship exemption under

§815.107(a) of the electronic filing requirements may include small and microbusinesses, the Commission authorization of the exemption would provide appropriate mitigation for those classes of employers.

Mark Hughes, Director of Labor Market Information, has determined that there is no significant negative impact upon employment conditions in the state as a result of the rules.

The Agency hereby certifies that the proposed rules have been reviewed by legal counsel and found to be within the Agency's legal authority to adopt.

LaSha Lenzy, Director of the Unemployment Insurance Division, has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the proposed amendments will be to ensure compliance with federal and state requirements.

PART IV. COORDINATION ACTIVITIES

In the development of these rules for publication and public comment, the Commission sought the involvement of each of Texas' 28 Boards and the TWC Advisory Committee. The Commission provided the policy concept to each of these groups for consideration and review. During the rulemaking process, the Commission considered all information gathered in order to develop rules that provide clear and concise direction to all parties involved.

Comments on the proposed rules may be submitted to TWC Policy Comments, Workforce and UI Policy, 101 East 15th Street, Room 440T, Austin, Texas 78778; faxed to (512) 475-3577; or e-mailed to TWCPolicyComments@twc.state.tx.us. The Commission must receive comments postmarked no later than 30 days from the date this proposal is published in the *Texas Register*.

SUBCHAPTER B. BENEFITS, CLAIMS AND APPEALS

40 TAC §815.20

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rules affect Texas Labor Code, Title 4.

§815.20. Claim for Benefits.

An unemployed individual who has no current benefit year and who wishes to claim benefits shall report to a representative of the Agency in a manner, including telephonic, Internet, or other [~~electronic~~] means, that the Agency may approve, and file a claim for benefits. Before receiving benefits a claimant shall register for work with the public employment office, including workforce centers, serving the individual's area of residence, as provided in paragraphs (3) and (7) of this section, unless exempt from the requirement.

(1) In case of a mass layoff by an employer, if the last employing unit involved makes an appropriate request, the Agency may accept, in lieu of an initial claim from each individual, a list furnished by the last employer of the individuals to be laid off and who wish to file initial claims for benefits. The list shall reflect, with respect to each individual, all information normally required on the initial claim by the Agency, except the reason for separation. If the Agency approves the request, the listing then may [~~then~~] be used by the Agency as an initial claim for each individual on the list.

(2) After an individual files a valid initial claim, which establishes the claimant's benefit year, the claimant may, during the benefit year, file subsequent continued claims, weekly or biweekly, by telephonic means, facsimile (fax) transmission, mail, common carrier, Internet, or other means as the Agency may approve in writing, but at intervals of no less than [~~periods of~~] seven consecutive days. A claimant shall file all claims by telephonic means, in writing, or orally, during the hours, [~~and~~] days, and weeks directed by Agency representatives. Internet filing is available 24 hours each day. If at any time during the benefit year, more than 30 days have elapsed since the filing of the claimant's last claim, the claimant shall file an additional or reopened claim for benefits as defined in §815.1 [~~of this chapter~~] (relating to Definitions) and shall comply with all eligibility requirements for the claims. A claimant who exhausts [~~the claimant's~~] regular benefits may file continued claims for extended benefits as referenced in §815.26 [~~of this chapter~~] (relating to Extended Benefit Period Announcement) in the same manner in which the claimant filed claims for regular benefits, but the claimant's claims for extended benefits may be for benefit periods subsequent to the end of the claimant's benefit year.

(3) An individual who files a claim for benefits shall comply with all requirements of the public employment office in which the claimant files an application for work that are necessary to establish a valid registration for work in that public employment office. The claimant shall comply with [~~do the things requested by~~] an Agency representative's requests [~~representative~~], whether oral [~~requested orally~~] or written [~~in writing~~], that are reasonably designed to inform the claimant of the claimant's rights and responsibilities in filing a claim for benefits. The claimant also shall [~~also~~]:

(A) provide evidence, upon request [~~when requested to do so~~], to establish the claimant's correct Social Security [~~social security~~] account number;

(B) file all claims in the manner directed by the Agency, whether on Agency-provided forms or by telephonic, Internet, or other [~~electronic~~] means approved by the Agency for claims purposes;

(C) supply all information within the claimant's knowledge, which is necessary to determine the claimant's rights to benefits under the Act;

(D) sign all provided claims forms personally for the claims that are filed in person or by mail or common carrier; and

(E) submit all claims filed by mail, common carrier, hand delivery, or by other means, including telephonic or Internet [~~or electronic means~~], as instructed by the Agency, in accordance with the terms of this section.

(4) An individual may file a claim by mail, common carrier, hand delivery, or by other means as the Agency may approve, in writing in any of the following circumstances:

(A) Conditions exist that [~~conditions~~] make it impracticable for the Agency representative to take claims by telephonic, Internet, or other approved means; or

(B) The [~~the~~] Agency finds that the claimant has good cause for failing to file a claim by telephonic, Internet, or other approved means.

(5) If a claimant's answer to a question on a claim filed with the Agency creates uncertainty about the claimant's credibility, or a lack of understanding, or the claimant's record shows that the claimant previously filed a fraudulent claim; then the claimant may be required to file written claims on an Agency-approved [~~a Agency approved~~] form in a manner prescribed by the Agency in writing. A claimant required to file a claim under this section [~~subsection~~] shall continue

to file the claim in the prescribed manner, until the Agency determines that the reason no longer exists and[,] directs otherwise in writing.

(6) The following provisions shall apply to the disqualification provisions of the Act, Chapter 207, Subchapter C, concerning disqualification for benefits.

(A) The term "employment" in the Act, Chapter 207, Subchapter C, shall be interpreted and applied to mean employment as defined in the Act.

(B) The disqualification to be imposed against an individual who has left work to move with a spouse, as provided in the Act, §207.045(c), shall be construed to mean both a benefits (money payments) and a benefit period (time period) disqualification; and such [a] disqualification shall be restricted in its application to apply only to the range from six weeks to 25 weeks.

(C) Agency employees are authorized to administer oaths to claimants in an effort to verify that the requalifying [re-qualifying] requirements of the Act, Chapter 207, Subchapter C, concerning employment or earnings, have been satisfied.

(D) An employer identified as the employer by whom the claimant was employed, for purposes of satisfying the requalifying [re-qualifying] requirements of the Act, Chapter 207, Subchapter C, shall be afforded 14 days within which to respond to notice by the Agency of the filing of an additional claim by the claimant.

(E) In order to satisfy the requirement of the Act, Chapter 207, Subchapter C, concerning returning to employment and working for six weeks, a "work week" shall be defined as seven [a] consecutive days [seven-day period] during which the claimant has worked at least 30 hours.

(F) Disqualifying separations, new benefit year, and extended benefit period.

(i) A claimant filing an initial claim, continued claim, or additional claim shall be disqualified from receiving benefits if the separation from the claimant's last work is a disqualifying separation as defined in the Act, Chapter 207.

(ii) If a work separation in a previous benefit year is the last separation prior to a claimant's filing an initial claim that creates a new benefit year, then that work separation may result in a disqualification in the new benefit year in accordance with the provisions of the Act, Chapter 207.

(iii) A disqualification resulting from a work separation in a benefit year shall continue during the extended benefit period until:

(I) the extended benefit period is terminated;

(II) the claimant qualifies to file a new initial claim; or

(III) the claimant requalifies [re-qualifies] in accordance with the provisions of the Act, Chapter 207, under which the disqualification was imposed.

(7) A claimant shall be eligible to receive benefits with respect to any week only if the individual demonstrates the availability for work required by the Act, §207.021(a)(4), and, if required by §207.021(a)(8), by participating in reemployment [re-employment] services, including, but not limited to, job search assistance [services], if the claimant has been determined to be likely to exhaust regular benefits and needs reemployment [re-employment] services pursuant to a profiling system established by the Agency.

(8) The following categories of claimants are exempt from the requirement to register for work:

(A) individuals on temporary layoff with a definite date to return to work;

(B) members in good standing in [of] unions that maintain a hiring hall; and

(C) individuals participating in a Shared Work plan as defined in the Act, Chapter 215.

(9) Withholding from [From] Benefits for Federal Income Tax.

(A) An individual filing a new claim for unemployment compensation shall, at the time of filing the claim, be advised that:

(i) unemployment compensation is subject to federal, state, and local income tax;

(ii) requirements exist pertaining to estimated tax payments;

(iii) the individual may elect to have federal [Federal] income tax deducted and withheld from the individual's payment of unemployment compensation at the amount specified in the federal [Federal] Internal Revenue Code; and

(iv) the individual shall be permitted to change a previously elected withholding status.

(B) Amounts deducted and withheld from unemployment compensation shall remain in the unemployment fund until transferred to the federal [Federal] taxing authority as a payment of income tax.

(C) The Agency shall follow all procedures specified by the United States Department of Labor and the federal [Federal] Internal Revenue Service pertaining to [the] deducting and withholding of income tax.

(D) Amounts shall be deducted and withheld under this section only after amounts are deducted and withheld under any other provisions of the [Texas Unemployment Compensation] Act.

(10) An employer's protest to an initial, additional, or continued claim made in accordance with the Act, §208.004, may be delivered by telephonic means, which includes a verification procedure approved by the Agency in writing, mail, common carrier, facsimile (fax), Internet, or other means approved by the Agency in writing and as prescribed in the Agency's notice of claim form.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2006.

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Reagan Miller
Deputy Director for Workforce and UI Policy
Texas Workforce Commission
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For further information, please call: (512) 475-0829

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SUBCHAPTER C. TAX PROVISIONS

40 TAC §§815.107, 815.109, 815.116, 815.134, 815.135

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rules affect Texas Labor Code, Title 4.

§815.107. Reports Required and Their Due Dates.

(a) All reports [~~Reports~~] and forms [~~Forms~~] required by the Agency or the Act shall be filed with the Agency in one of the following formats unless a different format is approved in writing by the Agency, a hardship exemption is requested from and granted by the Agency, or as specified in this chapter [~~Chapter~~].

(1) General Format of Reports and Forms and Methods of Submission. The reports and forms referenced in this section shall be filed [~~by~~] using:

(A) forms printed by the Agency;

(B) magnetic or electronic media in a format prescribed by the [~~this~~] Agency; or

(C) any other manner approved and prescribed by the Agency in writing.

(2) Content. The reports and forms shall contain all facts and information necessary to a determination of the amounts due by the employing unit. The Agency may require the furnishing of additional information as it deems necessary for the proper administration of the Act.

(3) Magnetic and Electronic Media Reporting [~~reporting~~].

(A) Required Magnetic or Electronic Media. Regarding filing of quarterly benefit wage credit reports as required by §207.004 of the Act, the following shall file benefit wage credit reports on magnetic or electronic media using a format prescribed by the Agency:

(i) Employers who have to file a report on 10 [~~250~~] or more employees in any one calendar quarter; and

(ii) Other [~~other~~] entities, including agents reporting on behalf of multiple employers, who have to file reports on a cumulative total of 10 [~~250~~] or more employees in any one calendar quarter.

(B) Voluntary Use of Magnetic or Electronic Media. Employers, including agents reporting on behalf of multiple employers, who file a benefit wage credit report on a cumulative total of less than 10 [~~250~~] employees in any one calendar quarter, as defined in §207.004 of the Act, may voluntarily elect to use magnetic or electronic media reporting.

(C) A magnetic or electronic media wage report may contain information from more than one employer.

(D) A quarterly benefit wage credit report filed in an approved medium shall contain both a wage credit report and a summary report.

(b) General Deadlines for Filing Reports and Forms.

(1) Unless otherwise provided in this subchapter, any report or form shall be completed and filed with the Agency within 10 [~~ten~~] days after the requested report or form is [~~either~~]:

(A) mailed to the individual or employing unit at the address on record with the Agency;[~~,~~] or

(B) personally delivered to the individual or employing unit by an Agency representative.

(2) Failure to receive notice regarding the reports shall not relieve the individual or employing unit of the responsibility of filing the reports by the date the reports are due.

(3) Good Cause for Extending Deadlines. When good cause is shown, the Agency may extend the due date for filing of a report required under this section; however, the extension shall [~~only~~] be effective only if authorized in writing by an Agency representative.

(c) Status Reports.

(1) Status Reports in [~~In~~] General. Each employing unit shall file with the Agency a status report within 10 [~~ten~~] days from the date upon which the employing unit becomes subject to the Act.

(2) Status Reports for New Acquisitions. Any employing unit in the state [~~State~~] of Texas that[~~, which~~] acquires another business or substantially all of the assets of another business shall file a new status report with [~~to~~] the Agency within 10 [~~ten~~] days of the date on which the employing unit made the acquisition.

(3) Status Reports for Additional Information. Each employing unit shall file additional status reports at any time upon the request of the Agency.

(4) Evidence in Support of Status Reports. Employing units filing status reports with [~~to~~] the Agency shall:

(A) file with the Agency all facts necessary to a determination of the taxable status of the employing unit;[~~,~~] and

(B) if requested, file with the Agency evidence to establish the correctness of information contained in the employing unit's status reports.

(d) Quarterly Reports from Taxed Employers. Each taxed employer, other than a domestic employer who has elected to report and pay annually under §201.027(b) of the Act, shall file with the Agency, within the month during which contributions for any period become due, and not later than the date on which contributions are required to be paid to the Agency, an employer's quarterly report showing for the preceding calendar quarter:

(1) the total amount of remuneration paid for employment (or showing that no remuneration was paid during the quarter);

(2) the total amount of wages paid for employment (as defined in the Act, §201.081 and §201.082);

(3) the amount of wages for benefit wage credits (as defined in the Act, §207.004) paid to each individual employee;

(4) the name and Social Security [~~social security~~] number of each individual to whom the wages were paid; and

(5) any other information requested on the employer's quarterly report, including all facts and information necessary to make a determination of the amount of contributions due.

(e) Quarterly Reports from Reimbursing Employers and Group Representatives of a Group Account. Each reimbursing employer and the group representative of a group account shall file an employer's quarterly report, by the end of the month following each calendar quarter, that furnishes the following information for the preceding calendar quarter, information specified in paragraphs (1) - (4) of subsection (d) [~~subsection (d)(1) - (4)~~] of this section, and any other information necessary to make a determination of the amount of reimbursements due.

(f) Benefits Financed by the Federal Government. Each employer that [~~which~~] has employees whose benefits are to be financed by the federal government shall file a separate quarterly report furnish-

ing the names of the employees, their Social Security [~~social security~~] numbers, and the wages paid to each. The report shall be filed by the end of the month following each calendar quarter.

(g) Annual Reports from Domestic Employers.

(1) Making the Election. An election to report wages paid and pay contributions on an annual basis must be made in a format or on a form authorized by the Agency by the deadline specified in §201.027 of the Act.

(2) Each domestic employer [~~Domestic Employer~~] that qualifies under the Act and who has made an election as referenced in paragraph (1) of this subsection [~~(g)~~], shall file with the Agency, by January 31 of the year after the wages were paid, in a format consistent with subsection (a) of this section, a domestic employer's annual report showing the following for the preceding calendar year in which wages were paid. [~~the following:~~]

(A) The [~~the~~] information specified in paragraphs (1) - (4) of subsection (d) [~~(d)(1) - (4)~~] of this section subtotaled for each quarter; and

(B) Other [~~other~~] information called for on the domestic employer's annual report including all facts and information necessary to make a determination of the amount of contributions due.

(3) Penalties and interest incurred under this section shall be the same as applicable to other employer reporting requirements as provided in Chapter 213 of the Act and this subchapter [~~Subchapter C. relating to Tax Provisions~~].

§815.109. Payment of Contributions and Reimbursements.

(a) When, in any calendar year, an individual or employing unit becomes an employer (other than a reimbursing employer) subject to this Act, the employer shall, on or before the last day of the month following the month during which the employer became a subject employer, file a report as specified in §815.107 and pay contributions with respect to all completed calendar quarters in the calendar year. Contributions for the quarter during which the employer becomes a subject employer shall be due on the first day of the month immediately following the quarter and shall be paid on or before the last day of the month. Contributions shall accrue quarterly and shall become due on the first day of the month immediately following the calendar quarter. They shall be paid to the Agency on or before the last day of the month. The provisions in [~~this~~] subsection (a) of this section shall apply unless otherwise provided in §201.027 of the Act.

(b) Reimbursements shall become due on the last day of the month following the end of each quarter and shall be paid to the Agency on or before the last day of the next month.

(c) When the last day for payment of contributions or reimbursements falls on a Saturday, Sunday, or a legal holiday on which the Agency office is closed, the payment may be made on the next regular business day.

(d) An employer or other entity, including agents paying on behalf of multiple employers, which paid contributions in the preceding state fiscal year of $250,000 or more, and which is reasonably anticipated to do the same in the current fiscal year, is required to transfer payment amounts of contributions by electronic funds transfer on or before the date the contributions are due, unless the Agency in writing has approved another method or form of payment. Except as otherwise provided in this subsection, employers, including agents, may voluntarily transfer payment of contributions by electronic funds transfer on or before the date the contributions are due, unless the Agency in writing has approved another method or form of payment. The transfers, when applicable, shall be subject to the provisions of the Texas Government Code[,] §404.095, and to rules adopted by the state comptroller pursuant to that section.

(e) Additional tax resulting from a chargeback adjustment is due on the first day of the second month following the month in which the Agency mailed the statement or letter notifying the employer of the change in tax rate and additional tax due. Amounts due from such chargeback adjustments shall be paid and must be received by the Agency on or before the last day of this second month.

(f) When good cause is shown, the Agency may extend the due date for the payment of contributions or reimbursements. The[~~; however, the~~] extension [~~may not exceed 60 days and~~] shall not be effective unless it [~~the extension~~] is authorized in writing by the Agency. In the event the Agency for good cause shown extends the due date for payment of contributions or reimbursements, the payments shall be made to the Agency on or before the thirtieth [~~30th~~] day following the extended due date.

(g) An agent or other entity making a payment on behalf of [~~20 or more~~] employers shall furnish an allocation list on magnetic or electronic media using a format prescribed by this Agency, unless the Agency has approved another format and method in writing. This list shall be furnished with the remittance, and the remittance shall be allocated to the credit of the employers according to the order in which the employers appear on the list.

§815.116. Identification and Tracking of Transfers and/or Acquisitions of Businesses.

(a) An electronic method of tracking the reporting of employees and wages will be employed by the Agency to assist in ascertaining instances of improper reporting by employers.

(b) To aid the Agency in this determination, upon request and as determined necessary by the Agency, employers shall provide information sufficient to enable the Agency to determine:

(1) the status of the employing unit under investigation and whether the employer is liable under the Act;

(2) the proper employer of the employees reported and whether the wages are reported by the proper entity;

(3) the relationship between the predecessor or successor entity and whether a mandatory transfer of compensation experience is required under §204.083 of the Act; and

(4) the correct calculation of the tax rate assigned to the employer.

§815.134. Employment Status: Employee or Independent Contractor.

Subject to specific inclusions and exceptions to employment enumerated in Chapter 201 of the Act, the Commission shall use the guidelines referenced in §821.5 of this title as the official guidelines for use in determining employment status.

§815.135. Voluntary Election by Employers.

(a) Each employer electing coverage under Chapter 206 of the Act shall make this election in writing on an Agency-specified form or electronic equivalent.

(b) Each employer electing to pay reimbursements for benefits, rather than contributions, shall make this election:

(1) in writing on the Agency-specified form or electronic equivalent; and

(2) in compliance with the requirements of Chapter 205, Subchapter A, of the Act.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2006.

TRD-200606240
Reagan Miller
Deputy Director for Workforce and UI Policy
Texas Workforce Commission
Earliest possible date of adoption: December 31, 2006
For further information, please call: (512) 475-0829

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SUBCHAPTER D. FARM AND RANCH LABOR

40 TAC §815.150

The rules are proposed under Texas Labor Code §301.0015 and §302.002(d), which provide the Texas Workforce Commission with the authority to adopt, amend, or repeal such rules as it deems necessary for the effective administration of Agency services and activities.

The proposed rules affect Texas Labor Code, Title 4.

§815.150. Definition of Terms.

The following words and terms shall apply to the Act, §§201.028, 201.047, and 204.009, concerning farm and ranch labor, and shall have the following meanings unless the statute or context clearly indicates otherwise.

(1) Agricultural association--Any nonprofit or cooperative association of farmers, growers, or ranchers incorporated or qualified under state law, which recruits, solicits, hires, employs, furnishes, or transports migrant or seasonal agricultural workers.

(2) Agricultural employer--Any individual who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, or nursery or who produces or conditions seed, and who either recruits, solicits, hires, employs, furnishes, or transports any migrant or seasonal agricultural workers.

(3) Farm labor contracting activity--The recruiting, soliciting, hiring, employing, furnishing, or transporting of migrant or seasonal agricultural workers.

(4) Farm labor contractor--Any individual, other than an agricultural employer, an agricultural association, or an employee of an agricultural employer or agricultural association, who, for any money or other valuable consideration paid or promised to be paid, performs any farm labor contracting activity.

(5) Farm and ranch labor--Includes all services performed:

(A) On a farm or ranch in the employ of an individual in connection with cultivating the soil; raising or harvesting an agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur bearing wildlife; or

(B) In the employ of the owner, tenant, or other operator of a farm or ranch, in connection with the operation, management, conservation, improvement, or maintenance of such farm or ranch and its tools and equipment, if the major part of such service is performed on a farm or ranch.

(6) Labor agent--An individual in Texas, who for a fee offers, attempts to procure, or procures employment for employees; or without a fee offers, attempts to procure, or procures employment for common or agricultural workers; or any individual, who for a fee attempts to procure or procures employees for an employer; or without a fee offers or attempts to procure common or agricultural workers for employers; or any individual, regardless of whether a fee is received or due, who offers, attempts to supply, or supplies the services of common or agricultural workers to any individual.

(7) Migrant worker--An individual who is employed in farm or ranch labor of a seasonal or temporary nature and who is required to be absent overnight from his or her permanent place of residence, provided the individual is not a temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under 8 U.S.C. §1101(a)(15)(H)(ii)(a) and §1184(c).

(8) Orchard--A farm devoted primarily to the planting, cultivating, growing, or harvesting of fruits or nuts.

(9) Other farm or ranch laborer--An individual employed in farm or ranch labor or who is neither a seasonal worker nor a migrant worker.

(10) Seasonal worker--An individual who is employed in farm or ranch labor of a seasonal or temporary nature and is not required to be absent overnight from his or her permanent place of residence, provided the individual is not a temporary nonimmigrant alien who is authorized to work in agricultural employment in the United States under 8 U.S.C. §1101(a)(15)(H)(ii)(a) and §1184(c).

(11) Truck farm--A farm on which fruits, garden vegetables for human consumption, potatoes, sugar beets, or vegetable seeds are produced for market.

(12) Vineyard--A farm devoted primarily to the planting, cultivating, growing, or harvesting of grapes.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 16, 2006.

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Reagan Miller
Deputy Director for Workforce and UI Policy
Texas Workforce Commission
Earliest possible date of adoption: December 31, 2006
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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 27. TOLL PROJECTS

SUBCHAPTER A. COMPREHENSIVE DEVELOPMENT AGREEMENTS

43 TAC §§27.2 - 27.5, 27.7 - 27.9

The Texas Department of Transportation (department) proposes amendments to §27.2, definitions, §27.3, general rules for private involvement, §27.4, solicited proposals, §27.5, unsolicited proposals, and new §27.7, design-build contracts, §27.8, conflict of interest and ethics policies, and §27.9, sanctions, all concerning comprehensive development agreements.

EXPLANATION OF PROPOSED AMENDMENTS AND NEW SECTIONS

Under Transportation Code, §223.203(e)(1), the Texas Transportation Commission (commission) is required to adopt rules establishing criteria for the prequalification of a private entity to submit a detailed proposal to provide services under a design-build contract that include the precertification requirements applicable to providers of engineering services and the qualification requirements for bidders on highway construction contracts. Rules for design-build projects adopted pursuant to that subsection are also required to provide for an expedited selection process that includes design innovation as a selection criterion.

The amendments and new sections implement requirements to adopt an ethics policy applicable to comprehensive development agreement procurements. The ethics policy is required to include conflict of interest guidelines applicable to private entities interested in participating in the department's comprehensive development agreement program and provisions relating to the acceptance of gifts and benefits by department employees. The amendments and new sections also prescribe rules of contact that regulate communications between proposers or any of its team members and the commission, department, and third parties involved in a procurement. The commission has prescribed conflict of interest provisions and communications restrictions in order to provide a fair and unbiased comprehensive development agreement procurement process and to ensure high standards of ethics and fairness in the administration of the comprehensive development agreement program.

The amendments and new sections concerning sanctions are applicable to private entities participating in the department's comprehensive development agreement program. The new provisions are modeled after the department's existing rules pertaining to contractor sanctions. The purpose of these provisions is to ensure high standards of ethics and fairness in the administration of the comprehensive development agreement program and to provide the department the appropriate remedy should a private entity engage in prohibited conduct.

In order to ensure the efficient administration of the comprehensive development agreement program and to ensure the commission and department further evaluate only those proposals that provide for the most efficient use of department resources, the amendments and new sections also clarify that the department, rather than the commission, approves the short list of entities considered most qualified to submit detailed proposals for a project, and prescribe additional information that must be contained in an unsolicited proposal, as well as additional criteria the commission will consider in determining whether to authorize the issuance of a request for competing proposals and qualifications for a project described in an unsolicited proposal.

The amendments and new sections finally make revisions necessary to ensure consistency in the processing of solicited and unsolicited proposals, and to make other nonsubstantive changes.

Amended §27.2, Definitions, defines words and terms used in new §§27.7 - 27.9. The definition of conflict of interest is consistent with the Federal Highway Administration's organizational conflict of interest regulations contained in 23 CFR §636.116, and is intended to provide a fair and unbiased comprehensive development agreement procurement process. That definition, and other definitions used in new §27.8, Conflict of interest and ethics policies, are authorized by Transportation Code, §223.209, which provides that the commission shall adopt rules, procedures, and guidelines governing selection of a developer for a comprehensive development agreement and negotiations to promote fairness, obtain private participants in projects, and promote confidence among those participants. Other amendments to §27.2 make grammatical and other nonsubstantive changes and renumber existing provisions.

Amended §27.3(e) adds terminology used in comprehensive development agreement procurement documents, recognizes that procurement documents will include additional rules of contact required by §27.8(d), and makes grammatical changes. Amended §27.3(l) and (o) clarify that those provisions apply to projects eligible for development under a comprehensive development agreement. Amended §27.3(p) makes a grammatical change, and §27.3(q) is removed as a result of the proposal of conflict of interest and ethics policies in new §27.8.

In order to ensure the efficient administration of the comprehensive development agreement program, amended §27.4(d) clarifies that the department, rather than the commission, approves the short list of entities considered most qualified to submit detailed proposals for a project, and makes nonsubstantive changes. Other amendments in §27.4 clarify that certain provisions apply to projects eligible for development under a comprehensive development agreement, and clarify that project financing is an authorized part of a comprehensive development agreement.

In order to ensure the efficient administration of the comprehensive development agreement program and the selection and scheduling of projects developed under the program, and to ensure the commission and department further evaluate only those proposals that provide for the most efficient use of department resources, amended §27.5(b) prescribes additional information that must be contained in an unsolicited proposal for a comprehensive development agreement project. The additional information will better allow the commission and the department to assess any unsolicited proposals consistent with the department's goals and limited financial and personnel resources. Those goals include better control by the department over the development, delivery, and scheduling of projects, which should improve the nature and substance of unsolicited proposals received by the department.

Amended §27.5(c) prescribes additional criteria on which a recommendation to the commission to issue a request for competing proposals and qualifications will be based. These criteria, and the additional information required to be contained in a proposal under §27.5(b), are intended to ensure that the commission and department further evaluate only those proposals that best meet the department's transportation planning goals and policies and that provide for the most efficient use of limited department and proposer resources.

Amended §27.5, Unsolicited proposals, also makes revisions necessary to ensure consistency in the processing of solicited and unsolicited proposals, makes changes to ensure consistency in terminology used in this subchapter, and to make other nonsubstantive changes to better clarify the requirements of this section.

Under new §27.7, Design-build contracts, the department will be authorized to prequalify private entities to submit detailed proposals to provide services under a design-build contract. Those contracts may be procured, as determined by the department, using a one-step process where entities are prequalified to respond to a request for proposals, and the department may enter into a design-build contract based solely on an evaluation of detailed proposals submitted in response to a request for proposals. This is unlike other types of comprehensive development agreements where a two-step procurement process is used, first to short-list the most qualified proposers to submit detailed proposals, and then to select the proposer whose detailed proposal provides the best value. As the prequalification process authorized under new §27.7 is a substitute for the evaluation of qualification submittals pursuant to a request for qualifications, each entity that is part of a proposer team that intends to submit a detailed proposal must be prequalified or precertified in accordance with the requirements of §27.7.

New §27.7(a) sets out the applicability of the new rule to design-build contracts under the department's comprehensive development agreement program.

New §27.7(b) provides a process for the prequalification of providers of construction, maintenance, and operations services to propose on design-build contracts under the department's comprehensive development agreement program. Private entities that are prequalified will be eligible to propose on design-build contracts in response to a request for proposals.

New §27.7(c) provides a process for the precertification of providers of engineering, architectural, or surveying services to propose on design-build contracts under the department's comprehensive development agreement program. Private entities that are precertified will be eligible to propose on design-build contracts in response to a request for proposals.

New §27.7(d) provides a process for the administrative qualification of providers of engineering, architectural, or surveying services on design-build contracts as required by the department's audit office. Administrative qualification includes an examination of a private entity's accounting system, an audit of its indirect cost rate, salary rates, and direct costs.

New §27.7(e) sets out the evaluation process for design-build contract proposals submitted in response to a request for proposals, and provides design innovation as a required criterion. The evaluation process will be comprised of an evaluation of detailed proposals received from prequalified private entities only. The department will not issue a request for qualifications to qualify entities to submit detailed proposals.

New §27.8, Conflict of interest and ethics policies, prescribes ethical standards of conduct applicable to private entities, including consultants and subconsultants, participating in the department's comprehensive development agreement program. A private entity's failure to comply with these standards of conduct may result in the private entity's preclusion from participation in a project or sanctions being imposed under §27.9, Sanctions.

New §27.8(b) prohibits a proposer, developer, consultant, or subconsultant participating in the comprehensive development agreement program, or an affiliate of any of those entities, from offering, giving, or agreeing to give a gift or benefit to a member of the commission or to a department employee whose work for the department includes the performance of procurement services relating to a comprehensive development agreement project, or who participates in the administration of a comprehensive development agreement. Section 27.8(b) provides certain exceptions to this prohibition for department consultants and subconsultants that are not a member of a proposer or developer team, consistent with state laws relating to gifts to public servants. No exceptions are made for proposers or developers because of the appearance of impropriety or competitive advantage that would result from the offer or acceptance of a gift or benefit.

New §27.8(c) prescribes department policy on conflicts of interest relating to consultants and subconsultants participating in the comprehensive development agreement program. This policy is necessary to protect the integrity and fairness of the program and all procurements carried out by the department as part of the program.

Section 27.8(c)(2) provides that this policy applies to all comprehensive development agreement projects undertaken by the department, and applies to consultants and subconsultants and their individual employees who participated in the performance of services for the department. The policy may by extension prohibit or restrict the ability of a proposer to have a consultant or subconsultant participate on the proposer team as an equity owner or team member, act as a consultant or subconsultant to the proposer, or have a financial interest in the proposer or an equity owner or team member of the proposer.

Section 27.8(c)(3) prescribes the period of time in which a conflict of interest will be deemed to exist, and the period of time the resulting prohibition or restriction provided in §27.8(c) will continue. Section 27.8(c)(4) provides that if a conflict of interest is determined to apply to an individual, it will not apply to the individual's new place of employment, other than an affiliate of its previous employer. The prohibition or restriction will continue to apply to the individual for the prescribed period of time. Section 27.8(c)(5) clarifies that the requirements of §27.8(c) do not limit, modify, or otherwise alter the applicability of the Federal Highway Administration's organizational conflict of interest regulations, which the department must comply with in the case of a federal-aid project.

Section 27.8(c)(6) prescribes general conflict of interest standards, which generally prohibit a consultant providing consultant services to the department with respect to a comprehensive development agreement project from being a proposer or participating as an equity owner, team member, consultant, or subconsultant of or to a proposer for that project, or having a financial interest in any of the foregoing entities with respect to that project. Except as provided in §27.8(c)(8) and (9), this prohibition would not apply to participation in a different comprehensive development agreement project.

Section 27.8(c)(7) contains exceptions to the prohibitions in §27.8(c)(6) for consultants providing preliminary engineering and architectural services, environmental services, and traffic and revenue services. Section 27.8(c)(8) prohibits consultants actively engaged and performing procurement services or financial services with respect to a comprehensive development agreement project from being a proposer or participating as an equity owner, team member, consultant, or subconsultant of or to a proposer for that project or any other comprehensive development agreement project, or having a financial interest in any of the foregoing entities with respect to any comprehensive development agreement project. Consultants providing those services have access to information that could provide a competitive advantage to a proposer.

Section 27.8(c)(9) prescribes conditions for consultants that have completed the performance of consultant services for the department to be a proposer or to participate as an equity owner, team member, consultant, or subconsultant of or to a proposer for a comprehensive development agreement project, or to have a financial interest in any of the foregoing entities with respect to a comprehensive development agreement project.

Section 27.8(c)(10) prescribes the process for a consultant, proposer, or developer to submit a request for a determination as to whether certain participation in a comprehensive development agreement project, or the performance of particular services with respect to a comprehensive development agreement project would constitute a conflict of interest, or to request approval of an exception to the applicability of the conflict of interest policies, including an appeal of a previous determination that a conflict of interest exists. Section 27.8(c)(10) also prescribes the criteria that will be considered by the executive director in reviewing a request.

Section 27.8(c)(11) concerns the applicability of the conflict of interest policies where a consultant is providing more than one category of consultant services to the department. Section 27.8(c)(12) concerns the eligibility of an entity participating with respect to a comprehensive development agreement project as a proposer or developer, or as an equity owner, team member, consultant, or subconsultant of or to a proposer or developer, or having a financial interest in any of the foregoing entities to provide consultant services (other than procurement services) to the department for another comprehensive development agreement project.

Section 27.8(c)(13) allows the department to restrict the scope of services a consultant or subconsultant may be eligible to perform for the department in order to further the intent and goals of §27.8(c), and to condition a determination that a conflict of interest does not exist or an exception to the applicability of the conflict of interest policies as appropriate to further the intent and goals of §27.8(c), including by requiring the consultant, subconsultant, proposer, or developer to execute confidentiality agreements, institute ethical walls, or segregate certain personnel from participation in a project or the performance of consultant services.

Section 27.8(c)(14) provides that the provisions in §27.8(c) do not address every situation that may arise in the context of the department's comprehensive development agreement program nor require a particular decision or determination by the executive director. The department retains the ultimate and sole discretion to determine on a case-by-case basis whether a conflict of interest exists and what actions may be appropriate to avoid, neutralize, or mitigate any actual or potential conflict, or the appearance of any conflict.

In order to provide a fair and unbiased procurement process, new §27.8(d) prescribes rules of contact regulating communications between proposers for a comprehensive development agreement project or any of its team members and the commission, the department, and third parties involved in the procurement. The prescribed rules must be contained in a request for qualifications, request for proposals, or request for competing proposals and qualifications. The rules of contact generally prohibit any ex parte communication regarding the project, request for qualifications, request for proposals, or request for competing proposals and qualifications or the procurement with any member of the commission or with any department staff, advisors, contractors, or consultants involved in the procurement until the earliest of the execution and delivery of the comprehensive development agreement, the rejection of all qualifications submittals or proposals by the department, or the cancellation of the procurement.

Certain communications may be allowed by the department in exceptional circumstances, and confidential communications may be made to a department employee not involved in the procurement. Section 27.8(d) allows the executive director to disqualify a proposer from the procurement and participation in the project at issue or to impose another sanction under §27.9 if it is determined that a proposer has engaged in any improper communications in violation of the rules of contact. Section 27.8(e) provides certain exceptions to the rules of contact.

New §27.9, Sanctions, is authorized by Transportation Code, §223.209, which provides that the commission shall adopt rules, procedures, and guidelines governing selection of a developer for a comprehensive development agreement and negotiations to promote fairness, obtain private participants in projects, and promote confidence among those participants.

Section 27.9(a) pertains to general sanction procedures. Subsection (a)(1) provides that a copy of the sanction rules will be included in certain procurement documents issued by the department. However, non-compliance with this provision will not affect the applicability of the sanction rules. Subsection (a)(2) references the criteria the department will consider when referring a private entity to the executive director for sanction action. Subsection (a)(3) sets forth the method by which a private entity will be notified of sanction action, the contents of such notice, as well as the effective date of the sanction. Subsection (a)(4) provides that the executive director and the private entity may modify the procedure for considering the sanction. Subsection (a)(5) specifies that sanction action does not affect the private entity's obligations under a comprehensive development agreement or any other agreement with the department nor does the action limit potential remedies available to the commission. Subsection (a)(6) provides that the term "private entity" also encompasses any affiliated entities and identifies what constitutes an affiliated entity. Subsection (a)(7) indicates that the private entity will be held responsible for the acts of individuals or other entities acting on behalf of the private entity.

Section 27.9(b) relates to the hearing process applicable to sanction actions. Subsection (b)(1) indicates that the private entity has the opportunity for a hearing as provided in §1.21 of the department's rules (pertaining to Procedures in Contested Cases). Subsection (b)(2) provides for a stay of sanctions (except for suspension action) pending the hearing process. Subsection (b)(3) specifies that the commission may reduce, eliminate or modify the sanction in the public interest. Subsection (b)(4) provides an exception to the hearing process if the private entity is sanctioned through the use of a reprimand.

Section 27.9(c) creates guidelines for the application of sanctions. Subsection (c)(1) indicates that the executive director will determine whether a private entity has committed a sanctionable act or omission. Subsection (c)(2) provides that the executive director will consider all facts and circumstances, including the seriousness of the act or omission and any mitigating circumstances, in determining whether or not a private entity will be sanctioned. Subsection (c)(3) sets forth a non-exclusive list of mitigating circumstances which may be considered by the executive director in deciding whether or not to impose sanctions. Subsection (c)(4) explains that the executive director will determine the level of sanction to be imposed on the private entity.

Subsection (c)(5) sets forth the concept of progressive sanction action, whereby the executive director may use increasingly more severe sanctions to achieve compliance with the department's policies and procedures. Subsection (c)(6) indicates that multiple violations by a private entity may result in multiple sanctions which may be imposed consecutively or in any order. Subsection (c)(7) authorizes the imposition of a lesser sanction as opposed to the maximum sanction permitted by the rules. Subsection (c)(8) grants the executive director the discretion to reduce, eliminate, or modify a sanction in the best interest of the state or the comprehensive development agreement program.

Section 27.9(d) relates to suspension action. Subsection (d)(1) provides that the executive director may immediately suspend a private entity without a prior hearing if the private entity is notified of a debarment. Subsection (d)(2) indicates that a suspension terminates when a final order is entered after a hearing or when ordered by the executive director.

Section 27.9(e) details the grounds for sanction action, specific sanction levels and subsequent use of sanction information. Subsection (e)(1) enumerates the specific acts or omissions for which the executive director may sanction a private entity. Subsection (e)(2) provides that the executive director will determine the sanction level and sets forth the four levels of sanction action, ranging from reprimand to permanent debarment. Subsection (e)(3) indicates that a debarment may not be for more that the period of debarment established by the state or federal agency on whose actions the debarment is based. Subsection (e)(4) allows the department to consider any sanction imposed against a private entity during the evaluation of qualification submittals and other proposals submitted by the private entity during a procurement process.

FISCAL NOTE

James Bass, Chief Financial Officer, has determined that for each of the first five years the amendments and new sections as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments and new sections. There are no anticipated economic costs for persons required to comply with the amendments and new sections as proposed.

Phillip Russell, Director, Texas Turnpike Authority Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the amendments and new sections.

PUBLIC BENEFIT

Mr. Russell has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments and new sections will be to ensure there is a fair and unbiased comprehensive development agreement procurement process, to ensure high standards of ethics and fairness in the administration of the comprehensive development agreement program, and to provide an expedited selection process for comprehensive development agreements relating to design-build contracts. There will be no adverse economic effect on small businesses.

SUBMITTAL OF COMMENTS

Written comments on the proposed amendments and new sections may be submitted to Phillip Russell, Director, Texas Turnpike Authority Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483. The deadline for receipt of comments is 5:00 p.m. on January 2, 2007.

STATUTORY AUTHORITY

The amendments and new sections are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §223.203, which provides that the commission shall adopt rules establishing criteria for the prequalification of a private entity to submit a detailed proposal to provide services under a design-build contract, and Transportation Code, §223.209, which provides that the commission shall adopt rules, procedures, and guidelines governing selection of a developer for a comprehensive development agreement and negotiations to promote fairness, obtain private participants in projects, and promote confidence among those participants.

CROSS REFERENCE TO STATUTE

Transportation Code, Chapter 223, Subchapter E.

§27.2. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Affiliate--An entity that directly or indirectly controls, is controlled by, or is under common control with a private entity.

(2) Certification of eligibility status form--A notarized form describing any suspension, voluntary exclusion, ineligibility determination actions by an agency of the federal government, indictment, conviction, or civil judgment involving fraud or official misconduct, each with respect to the proposer or any person associated with the proposer in the capacity of owner, partner, director, officer, principal investor, project director/supervisor, manager, auditor, or a position involving the administration of federal funds, covering the three-year period immediately preceding the date of the qualification statement.

(3) [~~(1)~~] Commission--The Texas Transportation Commission.

(4) [~~(2)~~] Comprehensive development agreement--An agreement with a private entity that, at a minimum, provides for the design and construction, reconstruction, extension, expansion, or improvement of an eligible project and may also provide for the financing, acquisition, maintenance, or operation of an eligible project.

(5) Confidential questionnaire--A prequalification form reflecting detailed financial and experience data.

(6) Conflict of interest--A circumstance arising out of the existing or past activities, business interests, contractual relationships, or organizational structure of a consultant, proposer, or developer, where:

(A) the private entity is or may be unable to give impartial assistance or advice to the department;

(B) the private entity's objectivity in performing the scope of work sought by the department is or might be otherwise impaired;

(C) the private entity has an unfair competitive advantage;

(D) the private entity's performance of services on behalf of the department provides or may provide an unfair competitive advantage to a third party; or

(E) there is a reasonable perception or appearance of impropriety or unfair competitive advantage benefiting the private en-

tity or a third party as a result of the private entity's participation in a comprehensive development agreement project.

(7) Consultant--An individual or business entity, including any division or affiliate of the entity, retained by the department to provide consultant services in connection with a comprehensive development agreement project. The term includes an individual or business entity providing or that has provided services under contract to a consultant, either directly or through a subconsultant, at any level.

(8) Consultant services--All services provided to the department by an independent contractor under a best value or qualifications based procurement method, including architectural and engineering services, right-of-way acquisition services, environmental services, planning services, procurement services, traffic and revenue services, project oversight services, financial services (including financial advisory and banking services), and legal services.

(9) Control--The possession, directly or indirectly, of the power to cause the direction of the management of the entity, whether through voting securities, by contract, family relationship, or otherwise.

(10) Debarment--Disqualification of a private entity from submitting a qualification submittal or other proposal to the department, as described in §§27.3 - 27.5 of this subchapter, entering into a comprehensive development agreement, or participating as a member of a proposer or developer team.

(11) [~~(3)~~] Department--The Texas Department of Transportation.

(12) [~~(4)~~] Design--Includes planning services, technical assistance, and technical studies provided in support of the environmental review process undertaken with respect to an eligible [~~a~~] project, as well as surveys, investigations, the development of reports, studies, plans and specifications, and other professional services provided for an eligible [~~a~~] project.

(13) Design-build contract--a comprehensive development agreement that includes the design and construction of a toll project, does not include the financing of a toll project, and may include the acquisition, maintenance, or operation of a toll project.

(14) Developer--A private entity (including any division or affiliate of the entity) that has entered into a comprehensive development agreement with the department.

(15) [~~(5)~~] Eligible project--A project described in Transportation Code, §223.201, and including a:

(A) toll project;

(B) facility or a combination of facilities on the Trans-Texas Corridor, as defined in §24.11 of this title (relating to Comprehensive Development Agreements);

(C) state highway improvement project that includes both tolled and nontolled lanes and that may include nontolled appurtenant facilities;

(D) state highway improvement project in which the private entity has an interest in the project;

(E) state highway improvement project financed wholly or partly with the proceeds of private activity bonds, as defined by Section 141(a), Internal Revenue Code of 1986; or

(F) project that combines a toll project and a rail facility as defined in Transportation Code, §91.001.

(16) Environmental and planning services--Some or all of the following services provided to the department with respect to a comprehensive development agreement project:

(A) the study and evaluation of alternatives and potential environmental impacts of the proposed project;

(B) preparation of environmental analysis and impact documents relating to the project, including facility and corridor analyses and draft and final environmental impact statements; and

(C) planning associated with the environmental approval, permitting, and clearance process for the project.

(17) [~~(6)~~] Executive director--The executive director of the department or designee not below the level of assistant executive director.

(18) Financial services--Some or all of the following services provided to the department with respect to a comprehensive development agreement project:

(A) acting in the capacity of financial advisor to the department by providing advice on finance-related issues, including development of short-term or long-term finance strategy and plans of finance for individual projects or on an ongoing basis;

(B) identifying and pursuing sources of funds; and

(C) acting as underwriter (either lead or co-lead) for a revenue bond issuance on a comprehensive development agreement project or facility, but excluding underwriters for bonds that are not related to a comprehensive development agreement project.

(19) Gift or benefit--Anything reasonably regarded as pecuniary gain or pecuniary advantage, including any benefit or favor to another person in whose welfare the beneficiary has a direct and substantial interest, regardless of whether the donor is reimbursed. The term includes, but is not limited to, cash, loans, meals, lodging, services, tickets, door prizes, free entry to entertainment or sporting events, transportation, or hunting or fishing trips.

(20) Legal services--Some or all of the following services with respect to a comprehensive development agreement project:

(A) providing advice on legal issues and strategies relating to project environmental approvals, planning, procurement, financing, contract administration, risk management, and disputes, claims, or litigation; and

(B) reviewing, drafting, and negotiating procurement documents, project contracts, and other documents.

(21) Preliminary engineering and architectural services--Preparation of preliminary design and architectural documents and reports, utility and right-of-way mapping, and provision of similar technical documents that will be incorporated by others into a request for qualifications, request for competing proposals and qualifications, or request for proposals, but not including the evaluation or selection of alignments in connection with the development of environmental documents, assistance with development of the solicitation documents, developer scope of work/technical provisions, evaluation criteria for a procurement, or other items that would constitute environmental services or procurement services.

(22) Procurement services--Some or all of the following services provided to the department with respect to a comprehensive development agreement project:

(A) development of procurement strategy;

(B) development and preparation of the solicitation documents, developer scope of work/technical provisions, or contract documents;

(C) implementation and administration of the solicitation;

(D) preparation or implementation of any evaluation criteria, process, or procedures;

(E) evaluation of proposer submissions (e.g., qualification submittals and proposals);

(F) negotiation of the contract; and

(G) any other activities determined by the department as related to a procurement.

(23) Project oversight services--Some or all of the following services provided to the department with respect to a comprehensive development agreement project after award of the comprehensive development agreement:

(A) design review;

(B) construction oversight and inspection;

(C) quality control and quality assurance;

(D) project management and overview;

(E) contract administration;

(F) claims management;

(G) public relations and community outreach;

(H) right of way acquisition services; and

(I) appraisal, legal description, condemnation package, and utility assembly review.

(24) [~~(7)~~] Proposal review fee--A fee prescribed by these rules that is required to be tendered with any unsolicited proposal.

(25) Proposer--A private entity, including any division or affiliate of the entity, that has submitted a statement of qualifications, proposal, or other submission in order to participate in an ongoing procurement for the development, design, construction, financing, operation, or maintenance of an eligible project under a comprehensive development agreement.

(26) Reprimand--A formal, written warning that documents an act or omission committed by the private entity.

(27) [~~(8)~~] Request for proposals--A request for submittal of a detailed proposal from private entities to acquire, design, develop, finance, construct, reconstruct, extend, expand, maintain, or operate an eligible project.

(28) [~~(9)~~] Request for qualifications--A request for submission by a private entity of a description of that entity's experience, technical competence, and capability to complete an eligible [~~a proposed~~] project, and such other information as the department considers relevant or necessary.

(29) Sanction--Debarment, suspension, prohibition against participation in particular procurement opportunities, or reprimand.

(30) Subconsultant--An individual or business entity that performs or performed work on behalf of a consultant as part of the performance of the consultant's work for the department, either directly or through a subconsultant at any level.

(31) Suspension--Immediate, temporary disqualification of a private entity from submitting a qualification submittal or other proposal to the department, as described in §§27.3 - 27.5 of this subchapter, entering into a comprehensive development agreement, or participating as a member of a proposer or developer team. Suspension differs from debarment in that it may take effect prior to and during the hearing process.

(32) [~~(10)~~] Toll project--Has the meaning assigned by Transportation Code, §201.001.

(33) Traffic and revenue services--Some or all of the following services provided to the department with respect to a comprehensive development agreement project:

(A) conducting draft and investment grade traffic and revenue studies, toll elasticity studies, toll feasibility studies, toll pricing studies, or studies or analyses of a similar nature, including peer review studies; and

(B) data mining and preparation of reports, analyses, and projections in connection with the traffic and projected revenues.

§27.3. General Rules for Private Involvement.

(a) - (b) (No change.)

(c) Costs incurred by proposers. Except as provided in §27.4(f) of this subchapter, under no circumstances will the state, the department, or any of their agents, representatives, consultants, directors, officers, or employees be liable for, or otherwise obligated to, reimburse the costs incurred by proposers, whether or not selected for negotiations, in developing solicited or unsolicited proposals or in negotiating agreements.

(d) (No change.)

(e) Procedure for communications. If a proposer has a question or request for clarification regarding these rules or any request for qualifications or request for proposals issued by the department, the proposer shall submit the question or request for clarification in writing to the person responsible for receiving those [~~all~~] submissions, as designated in the request for qualifications or request for proposals, and the department will provide the responses in writing. The proposer shall also comply with any other provisions in the request for qualifications or request for proposals regulating communications.

(f) - (k) (No change.)

(l) Proposer's work on environmental review of eligible project. The department may solicit proposals or accept unsolicited proposals in which the proposer is responsible for providing assistance in the environmental review and clearance of an eligible [~~the proposed~~] project, including the preparation of environmental impact assessments and analyses and the provision of technical assistance and technical studies to the department or its environmental consultant relating to the environmental review and clearance of the proposed project. The environmental review and the documentation of that review shall at all times be conducted as directed by the department and subject to the oversight of the department, and shall comply with all requirements of state and federal law, applicable federal regulations, and the National Environmental Policy Act (42 U.S.C. §4321 et seq.), if applicable, including but not limited to the study of alternatives to the proposed project and any proposed alignments, procedural requirements, and the completion of any and all environmental documents required to be completed by the department and any federal agency acting as a lead agency. The department:

(1) - (3) (No change.)

(m) - (n) (No change.)

(o) Additional matters. Any matter not specifically addressed in this subchapter which pertains to the acquisition, design, development, financing, construction, reconstruction, extension, expansion, maintenance, or operation of an eligible [~~a~~] project pursuant to this subchapter, shall be deemed to be within the primary purview of the commission, and all decisions pertaining thereto, whether or not addressed in this subchapter, shall be as determined by the commission, subject to the provisions of applicable law.

(p) Performance and payment security. The department shall require a private entity entering into a comprehensive development agreement to provide a performance and payment bond or an alternative form of security in an amount that, in the department's sole determination, [~~that~~] is sufficient to ensure the proper performance of the agreement, and to protect the department and payment bond beneficiaries supplying labor or materials to the private entity or a subcontractor of the private entity. Bonds and alternate forms of security shall be in the form and contain the provisions required in the request for proposals or the comprehensive development agreement, with such changes or modifications as the department determines to be in the best interest of the state. In addition to, or in lieu of, performance and payment bonds, the department may require:

(1) - (5) (No change.)

[~~(q) Ethics policy. The department shall adopt an ethics policy applicable to comprehensive development agreement procurements that includes:~~]

[~~(1) conflict of interest guidelines applicable to private entities interested in participating in the department's comprehensive development agreement program;~~]

[~~(2) conflict of interest requirements applicable to department employees and consultants involved in the comprehensive development agreement program, including provisions relating to impermissible interests held by an employee or consultant in a proposer or project; and~~]

[~~(3) provisions relating to the acceptance of gifts and benefits by department employees.~~]

§27.4. Solicited Proposals.

(a) - (c) (No change.)

(d) Request for qualifications - evaluation. The department, after evaluating the qualification submittals [~~submissions~~] received in response to a request for qualifications, will identify and approve a "short-list" that is composed of those entities that are [~~will be~~] considered most qualified to submit detailed proposals for a proposed project. In evaluating the qualification submittals [~~submissions~~], the department will consider such qualities that the department considers relevant to the project, which may include the private entity's financial condition, management stability, technical capability, experience, staffing, and organizational structure. The request for qualifications will include the criteria used to evaluate the qualification submittals [~~submissions~~] and the relative weight given to the criteria. The department shall advise each entity providing a qualification submittal [~~submission~~] whether it is on the short-list ["~~short-list~~"] of qualified entities.

(e) - (f) (No change.)

(g) Joint proposal by private entity and environmental consultant. If the department solicits proposals in which an entity affiliated with the proposing private entity will act as the department's environmental consultant for an eligible [~~the proposed~~] project, the request for proposals may require the submission of a consolidated joint proposal from the private entity and the environmental consultant or subcontractor that results in a comprehensive development agreement and separate contract for environmental services.

(h) - (j) (No change.)

(k) Negotiations with selected entity. If authorized by the commission, the department will attempt to negotiate a comprehensive development agreement with the apparent best value proposer to design, develop, construct, finance, reconstruct, extend, expand, maintain, or operate the project and (if included in the request for proposals) an environmental consultant contract. If a comprehensive development agreement satisfactory to the department cannot be negotiated with that proposer, or if, in the course of negotiations, it appears that the proposal will not provide the department with the overall best value, the department will formally end negotiations with that proposer and, in its sole discretion, either:

(1) - (3) (No change.)

(l) (No change.)

§27.5. Unsolicited Proposals.

(a) (No change.)

(b) Proposal contents. A proposal requesting department participation in a proposed project shall be filed with the department and must include the following information:

(1) the limits, scope, and location of the proposed project, including, where applicable, project length, project termini, number of lanes and lane miles, number and type of structures, and preliminary right-of-way requirements;

(2) all proposed interconnections with other transportation facilities and improvements to those facilities that will be necessary if the project is developed;

(3) if available, a conceptual project design and preliminary geotechnical information;

(4) information describing how the project will be consistent with the Statewide Transportation Plan and, if appropriate, with the metropolitan transportation plan developed by the metropolitan planning organization;

(5) [~~(2)~~] the results expected from project implementation, including anticipated financial performance and improvement to mobility and capacity, and the critical factors for the project's success;

(6) [~~(3)~~] all studies previously completed by the proposer concerning the project;

(7) [~~(4)~~] information concerning the experience, expertise, technical competence, and qualifications of the proposer and of each member of the proposer's management team and of other key employees, consultants, and subcontractors, including the name, address, and professional designation of each member of the proposer's management team and of other key employees, consultants, and subcontractors, the capability of the proposer to undertake the proposed project, and information responsive to the evaluation criteria listed in §27.4(d) of this subchapter;

(8) [~~(5)~~] a specific description of the level and nature of participation sought from the department, including technical support and financial participation, and the desired schedule for that participation;

(9) [~~(6)~~] to the extent then available, information relevant to the department's performance of its environmental review responsibilities under §27.3(l) and (m) of this subchapter;

(10) [~~(7)~~] a description of potential social, economic, and environmental impacts and potentially competing facilities, including the potential impacts of competing facilities on the proposed project;

(11) [~~(8)~~] other information of probable interest to the department; and

(12) [~~(9)~~] the proposal review fee required by §27.3(h) of this subchapter.

(c) Preliminary evaluation [~~Evaluation~~] of unsolicited proposal. Any proposal properly filed with the department in accordance with subsection (b) of this section and accompanied by the proper proposal review fee will be reviewed by the department. The department may meet with the proposer as necessary to clarify the proposal, or may issue requests for clarification. Based on that review and any clarification, the department will determine whether to further evaluate its requested participation in the applicable project. If the department determines that further evaluation of the proposal is warranted, a recommendation will be made to the commission to issue a request for competing proposals and qualifications. That recommendation shall be based on whether the proposed project:

(1) enhances the state transportation network, based on the project's:

(A) compatibility with existing and planned transportation facilities;

(B) furtherance of state, regional, and local transportation plans, programs, policies, and goals; and

(C) consistency with system planning objectives and priorities and projects under development;

(2) is ready to proceed to procurement, based on project constraints and characteristics, financial resources designated or available for the proposed project, the status of environmental approvals, project acceptability, and whether meaningful competition can be generated; and

(3) such other criteria as the department deems relevant.

[~~(1) is compatible with existing and planned transportation facilities; and~~]

[~~(2) furthers state, regional, and local transportation plans, programs, policies, and goals, as well as such other criteria as the department deems relevant.~~]

(d) Approval to request competing proposals and qualifications. If the recommendation is that the department further evaluate the proposal and its requested participation in the applicable project, and the commission approves that recommendation, the department will publish notice of that decision and provide an opportunity for the submission of competing proposals and qualifications as provided in this section. The department will publish a notice in the *Texas Register* and in one or more newspapers of general circulation in this state. The notice will state that the department has received an unsolicited proposal under these rules, that it intends to evaluate the proposal, that it may negotiate a comprehensive development agreement with the proposer based on the proposal, and that it will accept for simultaneous consideration any competing proposals and qualifications that the department receives in accordance with these rules within 45 days of the initial publication of the notice in the *Texas Register*, or such additional time as authorized by commission order. In determining whether to authorize additional time for submission of competing proposals and qualifications, the commission will consider the complexity of the proposed project. The notice will summarize the proposed project, and identify its proposed location and any proposed interconnections with other transportation facilities. The request for competing proposals and qualifications [~~notice~~] will [~~also~~] specify the criteria that will be used to evaluate the proposals, and the relative weight given to the criteria. The department may provide traffic counts, forecasts, conceptual designs, and other available technical studies, reports, and data either in the request for competing proposals and qualifications or upon request of any entity responding to the request. The department may also elect to furnish the request for competing proposals and qualifications to businesses in the private sector that the department otherwise believes might be interested and qualified to participate in the project which is the subject of the request for competing proposals and qualifications.

(e) Submission of revised [~~supplemental~~] proposal by original proposer. The private entity submitting the original unsolicited proposal shall be required to submit a proposal and qualification submittal in response to the request for competing proposals and qualifications. A proposal and qualification submittal submitted by that entity and any other entity in response to a request must contain the information required by subsection (b) of this section and any other information required in the request for competing proposals and qualifications.

(f) Exclusive procedure to consider competing proposals and qualifications submittals. Failure by a prospective proposer to submit a competing proposal and qualification submittal within the 45-day period or such additional time as authorized by the commission, shall preclude the proposal and qualification submittal from consideration by the department unless and until the department terminates consideration of, or negotiations on, the original unsolicited proposal, as supplemented in response to the request for competing proposals and qualifications, and any and all competing proposals and qualification submittals received within that time period. The department shall not be obligated to grant requests to extend the time period to submit competing proposals and qualification submittals. The receipt of one or more competing unsolicited proposals during that period will not trigger the posting or publication of a new notice or the commencement of any new time period.

(g) Noncompeting proposals. If the department receives proposals that have certain characteristics in common with the original unsolicited proposal, yet differ in other material respects, the department reserves the right, in its sole discretion, to treat such a proposal as either a competing proposal and qualification submittal or a noncompeting proposal. Because of the consequences to a proposer of failing to submit [~~a proposal that the department could later deem~~] a competing proposal and qualification submittal within the 45-day period, or such additional time as authorized by the commission, prospective proposers are strongly urged to monitor the department's notices of unsolicited proposals received, and be prepared to submit within that time period if they perceive that a proposal they are considering or are preparing bears certain similarities to, or has characteristics in common with, an unsolicited proposal which is the subject of a notice. A proposal that is deemed to be noncompeting will be evaluated as a new unsolicited proposal in accordance with this section.

(h) Evaluation of proposals - competing proposals and qualification submittals. Upon the expiration of the 45-day period, or such additional time as authorized by the commission, the department will subject the revised proposal submitted by the original proposer [~~unsolicited proposal, as supplemented in response to the request for competing proposals and qualifications~~], together with any and all properly submitted competing proposals and qualification submittals, to the following evaluation process. If one or more properly submitted competing proposals and qualification submittals are received, the department shall review the proposals and qualification submittals utilizing the evaluation criteria set forth in §27.4(d) of this subchapter and the

request for competing proposals and qualifications, and the information specified in subsection (b) of this section. The department will identify and approve a short-list that is composed of those proposers that are [~~will be~~] considered most qualified to submit detailed proposals for the proposed project, and the process will proceed in the manner described in §27.4(e) - (l) of this subchapter.

(i) Evaluation of proposals - no competing proposals and qualification submittals. If no properly submitted competing proposal and qualification submittal is received, the department will evaluate the revised proposal submitted by the original proposer [~~unsolicited proposal, as supplemented in response to the request for competing proposals and qualifications~~], proceeding, to the extent applicable, in the manner described in §27.4(h) - (l) of this subchapter.

§27.7. Design-Build Contracts.

(a) Applicability. The department may prequalify a private entity to submit a detailed proposal to provide services under a design-build contract. The department is not required to publish a request for qualifications for a design-build contract, and may enter into a design-build contract based solely on an evaluation of detailed proposals submitted by prequalified private entities in response to a request for proposals. If the department develops a concept for private participation in an eligible design-build project, or proceeds with the further evaluation of an unsolicited proposal for an eligible design-build project, and chooses to prequalify private entities to submit a detailed proposal without publishing a request for qualifications, it will proceed in accordance with the requirements of this section. Each entity comprising a team that intends to submit a detailed proposal must be prequalified or precertified in accordance with the requirements of this section.

(b) Prequalification.

(1) Audited financial qualification of construction, maintenance, and operations providers. Unless waived under subparagraph (B) of this paragraph, to be eligible to propose on a design-build contract as a provider of construction services, maintenance services, or operations services, a potential proposer must be prequalified in accordance with subparagraph (A) of this paragraph.

(A) Requirements.

(i) To be prequalified to propose, either individually or as a member of the proposers' team, as a provider of construction, maintenance, or operations services on a design-build contract, a private entity must:

(I) submit a completed confidential questionnaire to the department's Construction Division in Austin at any time, but at least 120 days prior to the due date for a response to a request for proposals, in a form prescribed by the department, which shall include certain information concerning the proposer's equipment, experience, and financial condition;

(II) have its certified public accountant submit the audited and other financial information required by the current edition of the department's Bulletin Number 2, titled "Contractor's Financial Resources";

(III) demonstrate it has the financial capacity to complete, operate, and maintain, as applicable, a specific project. Factors that will be considered in assessing a proposer's financial capacity include:

(-a-) the proposer's current financial strength;

(-b-) the proposer's credit quality;

(-c-) any claims, litigation, or equivalent current or pending against the proposer;

(IV) demonstrate, if it will be the prime provider of construction services under a contract, that it is capable of obtaining payment and performance bonds in the amount of $250 million, or 100% of the construction cost of the project, whichever is less, from a surety rated in the top two categories by two nationally recognized rating agencies or at least A minus (A-) or better and Class VIII or better by A.M. Best and Company, or an alternative form of security in the amount of $250 million, or 100% of the construction cost of the project, whichever is less, in accordance with §27.3 of this subchapter (relating to General Rules for Private Involvement);

(V) satisfactorily comply with any technical qualification requirements determined by the department to be necessary for a specific project; and

(VI) for the purpose of proposing on federal-aid projects, properly complete the Certification of Eligibility Status form contained in the Confidential Questionnaire.

(ii) The department will make its examination and determination based on the information submitted, and advise the potential proposer of its approved design-build contract capacity. Information adverse to the potential proposer contained in the Certification of Eligibility Status form will be reviewed by the department and the Federal Highway Administration, and may result in the proposer being declared ineligible to submit proposals on federal-aid projects.

(iii) Satisfactory audited financial information and financial capacity will grant a 36-month period of prequalification from the date of the department's determination.

(iv) The department may require current audited information at any time if circumstances develop which are factors that could alter the firm's financial condition, ownership structure, affiliation status, or ability to operate as an on-going concern. The potential proposer must immediately notify the department in writing of any material changes in its financial condition that occur while the department is conducting its examination.

(v) The department may grant a 90 day grace period of prequalification, for the purpose of preparing and submitting current audited information prior to the expiration of the 90 day period of prequalification.

(B) Waiver.

(i) The department will waive the audited financial qualification requirements of subparagraph (A) of this paragraph if the department's estimate is $10,000,000 or less unless the executive director or the director's designee determines that audited financial qualification should be required due to:

(I) safety considerations;

(II) the complexity of the work; or

(III) the potential impact of the work on adjacent property owners.

(ii) To be eligible to propose on a design-build contract for which the audited financial qualification requirements have been waived under clause (i) of this subparagraph, a proposer must:

(I) submit a proposer's questionnaire, in a form prescribed by the department, which includes certain information concerning a proposer's equipment and experience;

(II) submit unaudited and other data as required in the instructions to the proposer's questionnaire;

(III) demonstrate it has the financial capacity to complete, operate, and maintain, as applicable, a specific project. Fac-

tors that will be considered in assessing a proposer's financial capacity include:

(-a-) the proposer's current financial strength;

(-b-) the proposer's credit quality;

(-c-) any claims, litigation, or equivalent current or pending against the proposer;

(IV) demonstrate, if it will be the prime provider of construction services under a contract, it is capable of obtaining payment and performance bonds from a surety rated in the top two categories by two nationally recognized rating agencies or at least A minus (A-) or better and Class VIII or better by A.M. Best and Company, in an amount that is sufficient to ensure the proper performance of any agreement and protects the department and payment bond beneficiaries supplying labor or materials to the proposer or a subcontractor of the proposer, or an alternative form of security in accordance with §27.3 of this subchapter;

(V) satisfactorily comply with any technical qualification requirements determined by the department to be necessary on a specific project; and

(VI) for a federal-aid project, properly complete the Certification of Eligibility Status form contained in the proposer's questionnaire. Information adverse to the potential proposer contained in the certification will be reviewed by the department and by the Federal Highway Administration, and may result in the proposer being declared ineligible to submit a proposal on a federal-aid project).

(iii) The department will make its examination and determination based on the information submitted, and advise the proposer of its approved design-build contract capacity.

(I) A proposer with no prior experience in construction, maintenance, or operations, or a negative working capital position (i.e., financial statements indicate that current liabilities exceed current assets), will receive a design-build contract capacity of not less than $1,000,000.

(II) An experienced proposer with sufficient working capital and financial capability, as determined by the department, will receive a design-build contract capacity of:

(-a-) not less than $10,000,000 for a proposer submitting compiled financial information if the proposer has at least one year experience in construction, maintenance, or operations and has satisfactorily completed at least two projects in these fields;

(-b-) not less than $25,000,000 for a proposer submitting compiled financial information if the proposer has at least two years experience in construction, maintenance, or operations and has satisfactorily completed at least four projects in these fields. Those contractors possessing more than two years experience but less than five years experience will be granted at least an additional $5,000,000 in design-build contract capacity for each additional year of experience in construction, maintenance, or operations; and

(-c-) over $50,000,000 for a proposer submitting reviewed financial information if the proposer has at least five years of experience in construction, maintenance, or operations and has satisfactorily completed at least four projects in these fields.

(2) Financial statements. For purposes of this section:

(A) An audited financial statement involves an examination of the accounting system, records, and financial statements by an independent certified public accountant in accordance with generally accepted auditing standards. Based on the examination, the auditor expresses an opinion concerning the fairness of the financial statements in conformity with generally accepted accounting principles.

(B) A reviewed financial statement is substantially less in scope than an audited financial statement, and consists primarily of inquiries of proposer personnel and analytical procedures applied to financial data by an independent certified public accountant. Only negative assurance is expressed by the auditor, meaning the auditor is not aware of any material modifications that should be made in order for the financial statements to conform to generally accepted accounting principles.

(C) A compiled financial statement is limited to presenting in the form of financial statements information that is the representation of management. No opinion or any other form of assurance is expressed on the statements by the auditor.

(c) Precertification.

(1) Contract Eligibility. To be eligible to perform work on a design-build contract in the categories approved according to §9.43 of this title (relating to Precertification Requirements), a prime provider and a subprovider must be precertified in accordance with this section unless:

(A) the anticipated work in an individual work category is less than 2.5% of the contract; or

(B) the department has waived the precertification requirements for a contract that is less than $10,000,000.

(2) Application.

(A) Registered architects, registered professional engineers, registered or licensed professional surveyors, and other technical staff who desire to be precertified by the department to perform engineering, architectural, or surveying work on design-build contracts, shall submit a completed precertification application to the department for review and determination of precertification status.

(B) An application form prescribed by the department may be obtained by contacting the Texas Department of Transportation, Design Division, 125 East 11th Street, Austin, Texas 78701-2483, or through the department's web site.

(C) The application form will request information concerning the experience of the individual.

(D) The precertification web site will include:

(i) a copy of the application form;

(ii) instructions concerning submittal of information for precertification, including format and length restrictions for data to be submitted; and

(iii) the requirements for precertification in each category.

(E) The submittal date for review deadlines as described in paragraph (3) of this subsection shall be the date the precertification application is received by the department.

(F) The precertification of a provider by the department does not guarantee that work will be awarded to that provider.

(3) Deadline. When precertification is required as described in paragraph (1) of this subsection, prime providers and subproviders must be precertified in the technical categories by the due date for responses to a request for proposals to be eligible to submit a response.

(4) Data management. The department will maintain the qualification information submitted in the precertification application by the firm for an employee.

(5) Firm and employee status.

(A) A firm may be precertified in a work category if the firm has a current employee precertified in the category.

(B) A firm employee may be precertified in a work category if the employee possesses the skills and experience to meet the requirements. An employee is not precertified based on the firm's experience.

(C) A precertification will transfer with the employee if the employee leaves the firm.

(D) The department may review a firm's information to evaluate whether the support, equipment, and other resources necessary to do the work are provided to the employee.

(E) A firm with one employee who is precertified in multiple work categories is precertified in those categories. When required, prime providers and subproviders must be precertified in the categories of work they will be performing; however, a provider or subprovider is not required to be precertified in every category of work involved in the contract, unless it will be performing in a lead capacity on all categories of work.

(6) Review process.

(A) An individual, and therefore the firm, will be precertified within 60 days of receipt of complete and accurate information for the submittal, or notified in writing within the same time period that they did not meet the requirements for precertification or that additional submittals will be required for review.

(B) If the submittal is incomplete, a firm will be requested to submit additional information for review. The firm shall submit such information within 30 days of receipt of the department's request for such information. If the information is not provided within 30 days after receipt of the request, the application for precertification will be processed with the information available. The department will make a determination on precertification status within 60 days of receipt of the additional information.

(C) The department will consider the following factors in reviewing the precertification applications:

(i) current license or registration;

(ii) personal experience and training; and

(iii) work category requirements as maintained on the department's web site.

(7) Updates. A firm must report any change in the information included in the original application no later than 45 days after the change occurs.

(8) Appeal. A firm may appeal denial of precertification by submitting additional information to the department within 30 days of receipt of written notification of denial. This information shall justify why the applicant meets the requirements for precertification. The department will review the information and make a determination regarding precertification. A firm may file a written complaint regarding precertification denial with the executive director or his or her designee.

(9) Precertification requirements.

(A) Eligible employees. A firm may be precertified in the technical work categories maintained on the department's web site by providing the listed requirements. A firm may only submit an application for an individual who is employed by that firm at the time of submittal for precertification.

(B) Experience. The experience used to meet requirements may be either prior to or after licensure unless otherwise stated in a specific category. For the purpose of experience for precertification, the employee may be licensed to practice in any state for which that experience is recognized by the:

(i) Texas Board of Professional Engineers for engineers;

(ii) Texas Board of Architectural Examiners for architects; or

(iii) Texas Board of Professional Land Surveying for land surveyors.

(10) Work categories. The approved precertification work category definitions and requirements will be maintained on the department's web site. The commission, by minute order, may add, revise, or delete a work category.

(d) Administrative qualification.

(1) Exception. Administrative qualification is not necessary for non-engineering firms and provider services included in Group 6 - bridge inspection, Group 12 - materials inspection and testing, Group 14 - geotechnical services, Group 15 - surveying and mapping, and/or Group 16 - architecture as listed on the department's web site for precertification. Providers' compensation for these services is typically based on units of service rates.

(2) Time to provide information. Prime providers and subproviders may provide information described in this subsection prior to prequalification. If the information is not furnished before prequalification, it must be provided within 90 days after prequalification. The administrative qualification submittal is a separate submittal from the precertification submittal, and is submitted to the Texas Department of Transportation, Audit Office, 125 E. 11th Street, Austin, Texas 78701-2483. Administrative qualification submittals will not be received by the Design Division. Submission prior to selection is encouraged to facilitate timely contract execution requirements.

(3) Evaluation factors. The department will consider the following factors in determining administrative qualifications of prime providers or subproviders.

(A) Adequate accounting system. The prime provider or subproviders must demonstrate the existence of an adequate accounting system that meets the department's audit requirements, as evidenced by certification by an independent certified public accountant or governmental agency. The system must be adequate to support all billings made to the department and other clients.

(B) Indirect cost rate audit. The prime provider or subprovider must submit an indirect cost rate audit for the time period specified in clause (iii) of this subparagraph performed by an independent certified public accountant, an agency of the federal government, another state transportation agency, or a local transit agency except as provided in clauses (iv) and (v) of this subparagraph. If the audit is performed by an independent certified public accountant, the provider or subprovider must assure that the department will be given access to the audit work papers.

(i) The audit report shall include statements that the audit was performed in accordance with generally accepted auditing standards and the indirect cost rate was developed in accordance with the Federal Acquisition Regulations System, 48 CFR Part 31.

(I) AASHTO Uniform Audit and Accounting Guide is acceptable guidance for the audit of the indirect cost rate.

(II) Department requirements that differ from the AASHTO guide are contained in the Indirect Cost Rate Guidance available through the department's website.

(ii) The department may perform indirect cost rate audits of any prime provider or subprovider under contract to, or desiring to do business with the department. These audits will be conducted consistent with the criteria outlined in this subsection.

(iii) The end of the fiscal period of the audit report must be within eighteen months of the provider selection.

(iv) The department may contract with a prime provider or allow utilization of a subprovider lacking an approved indirect cost rate audit if:

(I) the value of the contract is less than $250,000;

(II) the prime provider or subprovider can adequately document and support all proposed costs; and

(III) all other qualification requirements of this subsection are met.

(v) Prime providers or subproviders who have been in operation with an accounting system acceptable to the department for less than one fiscal year since organization or comprehensive reorganization shall prepare a projected indirect cost rate for the first fiscal year of operation. The indirect cost rate will be supported by estimated expenditures and be in accordance with the Indirect Cost Rate guidance referred to in subparagraph (A) of this paragraph. The department's Audit Office will review the estimate and establish a provisional indirect cost rate for use in contract negotiations.

(C) Salary rates. The department will consider current salary rates, range of rates, or average rates by job classification.

(D) Direct costs. The department will consider other direct costs such as copies, Computer Aided Design and Drafting (CADD), or other direct costs.

(4) Prohibited actions. Administrative qualification information obtained through this section will not be made available by the department's Audit Office prior to execution of a contract.

(e) Requests for proposals for design-build contracts.

(1) Requests for proposals. If authorized by the commission, the department will issue a request for proposals from all private entities prequalified in accordance with this section, and the process will proceed in the manner described in §27.4(e) - (l) of this subchapter.

(2) Additional evaluation criteria. In addition to the evaluation criteria set forth in §27.4(e) - (l), design innovation shall also be a criterion in evaluation of proposals submitted in response to a request for proposals for a design-build contract.

§27.8. Conflict of Interest and Ethics Policies.

(a) Purpose. This section prescribes ethical standards of conduct applicable to private entities, including consultants and subconsultants, participating in the department's comprehensive development agreement program. A private entity's failure to comply with these standards of conduct may result in the private entity's preclusion from participation in a project or sanctions being imposed under §27.9 of this subchapter (relating to Sanctions).

(b) Gifts and benefits. A proposer, developer, consultant, or subconsultant participating in the comprehensive development agreement program, or an affiliate of any of those entities, may not offer, give, or agree to give a gift or benefit to a member of the commission or to a department employee whose work for the department includes the performance of procurement services relating to a project under this subchapter, or who participates in the administration of a comprehensive development agreement. Notwithstanding this prohibition, a consultant or subconsultant (unless a member of a proposer or developer team, if authorized under subsection (c) of this section) may:

(1) pay for an ordinary business lunch; and

(2) offer, give, or agree to give a token item that does not exceed an estimated value of $25 (excluding cash, checks, stocks, bonds, or similar items), where the item is distributed generally as a normal means of advertising.

(c) Conflicts of interest.

(1) Purpose. This subsection prescribes department policy on conflicts of interest relating to consultants and subconsultants participating in the comprehensive development agreement program, and thereby:

(A) protects the integrity and fairness of the program and all procurements carried out by the department as part of the program;

(B) avoids circumstances where a consultant, proposer, or developer obtains, or appears to obtain, an unfair competitive advantage as a result of work performed by a consultant or subconsultant;

(C) provides guidance to private entities so they may assess, and make informed business decisions concerning their participation in the program; and

(D) protects the department's interests and confidential and sensitive project-specific and programmatic information.

(2) Applicability. This subsection applies to all comprehensive development agreement projects undertaken by the department. This subsection applies to consultants and subconsultants, and to individual employees of consultants and subconsultants who participated in the performance of services for the department. To the extent that the department has previously consented in writing to a consultant's or subconsultant's performance of services that are in conflict with this subsection, participation on a proposer team as an equity owner or team member, acting as a consultant or subconsultant to a proposer, or having a financial interest in a proposer or an equity owner or team member of a proposer, this subsection does not modify or alter the prior consent. The foregoing does not prevent, however, the application of this subsection to the consultant or subconsultant for other projects, including taking into account the performance of services on the project for which consent was obtained. This subsection may by extension prohibit or restrict the ability of a proposer to have a consultant or subconsultant participate on the proposer team as an equity owner or team member, act as a consultant or subconsultant to the proposer, or have a financial interest in the proposer or an equity owner or team member of the proposer.

(3) Period in which a conflict of interest applies. If the executive director determines that the performance of services by a consultant or subconsultant raises a conflict of interest, the resulting prohibition or restriction provided in this subsection continues:

(A) for the private entity until one year after the date of the determination; and

(B) for an individual that is an employee of or was employed by the consultant or subconsultant and who participated in the performance of services for the department:

(i) until five years after the date of the determination for those projects for which the individual was materially involved in providing services to the department; and

(ii) until one year from the date of the determination for projects for which the individual was not materially involved in providing services to the department.

(4) Application to new firm. If a conflict of interest is determined to apply to an individual pursuant to paragraph (3)(B) of this subsection, the conflict of interest and prohibition with respect to the individual will not apply to the individual's new place of employment. If the new employer is otherwise eligible to perform consultant services, the new employer will remain eligible despite the employment of the individual. This paragraph does not apply to an individual employed by an affiliate of its previous employer, and the conflict of interest and prohibition with respect to the individual will apply to such affiliate.

(5) Federal requirements. For federal-aid projects, the department must comply with the Federal Highway Administration's organizational conflict of interest regulations (found in 23 CFR §636.116). The requirements of this subsection do not limit, modify, or otherwise alter the effect of those regulations, and will be applied consistent with those regulations.

(6) General conflict of interest standards. Except as provided in paragraph (7) of this subsection, no consultant providing consultant services to the department with respect to a comprehensive development agreement project may be a proposer or participate as an equity owner, team member, consultant, or subconsultant of or to a proposer for that project, or have a financial interest in any of the foregoing entities with respect to that project. Except as provided in paragraphs (8) and (9) of this subsection, a consultant performing consultant services for a comprehensive development agreement project will not be prohibited from participating on a different comprehensive development agreement project as a proposer or participating as an equity owner, team member, consultant, or subconsultant of or to a proposer for the different project, or having a financial interest in any of the foregoing entities with respect to the different project.

(7) Providing services for the same project. A consultant that is actively providing preliminary engineering and architectural services to the department with respect to a comprehensive development agreement project, or that performed and completed environmental or traffic and revenue services for a comprehensive development agreement project, may be a proposer or participate as an equity owner, team member, consultant, or subconsultant of or to a proposer for the same project, or have a financial interest in any of the foregoing entities with respect to that project, provided the executive director issues a written determination under paragraph (10) of this subsection that:

(A) the consultant will not, or in the case of the previous performance of consultant services did not, have access to or obtain knowledge of confidential or sensitive information, procedures, policies and processes that could provide an unfair competitive advantage with respect to the procurement for that project;

(B) the data and information provided to the consultant in the performance of the consultant services is either irrelevant to the procurement for that project or is available on an equal and timely basis to all proposers;

(C) the work products from the consultant incorporated into or relevant to the procurement for that project are generally available on an equal and timely basis to all proposers;

(D) with respect to environmental services, a record of decision or finding of no significant impact has been issued for the project; and

(E) with respect to traffic and revenue services, there will be no impact on the project's plan of finance, including the ability to obtain and close funding and potential sources of funding.

(8) Procurement and financial services. A consultant actively engaged and performing procurement services or financial services with respect to a comprehensive development agreement project may not be a proposer or participate as an equity owner, team member, consultant, or subconsultant of or to a proposer for that project or any other comprehensive development agreement project, or have a financial interest in any of the foregoing entities with respect to any comprehensive development agreement project.

(9) Completed services. A consultant that performed consultant services for a comprehensive development agreement project and completed the services may be a proposer or participate as an equity owner, team member, subconsultant or consultant of or to a proposer on a different comprehensive development agreement project, or have a financial interest in any of the foregoing entities with respect to a different project, provided that the executive director issues a written determination under paragraph (10) of this subsection that the conditions in paragraph (7)(A) - (C) of this subsection have been met.

(10) Requests for determinations or exceptions. A consultant, proposer, or developer may submit a request to the executive director for a determination whether participation in a comprehensive development agreement project or the performance of particular services with respect to a comprehensive development agreement project would constitute a conflict of interest, or to request approval of an exception to the applicability of this subsection to those services. A request for approval of an exception may be made if a consultant, proposer, or developer desires to appeal a previous determination by the executive director that a conflict of interest exists. The executive director will forward a request to the department's Office of General Counsel for analysis and recommendation prior to issuing a decision. In determining whether a conflict of interest exists, or whether to approve an exception, the executive director shall consider:

(A) the extent to which the firm or individual employee obtained access to or the ability to gain knowledge of confidential or sensitive information, procedures, policies, and processes concerning the comprehensive development agreement program or a particular project or procurement that could provide an unfair competitive advantage with respect to the procurement or project at issue;

(B) the type of consulting services at issue;

(C) the particular circumstances of each procurement;

(D) the specialized expertise needed by the department and proposers to implement the procurement;

(E) the past, current, or future working relationship between the consultant and the department;

(F) the period of time between the potential conflict situation and the project at issue; and

(G) the potential impact on the procurement and project at issue, including competition.

(11) Multiple services. If a consultant is providing more than one category of consultant services to the department and there are differences in the standards, restrictions, and limitations applicable to those categories, the standards, restrictions, and limitations applicable to a category that are more stringent will be applied.

(12) Participation on proposer or developer team. A consultant participating with respect to a comprehensive development agreement project as a proposer or developer, or as an equity owner, team member, consultant, or subconsultant of or to a proposer or developer, or having a financial interest in any of the foregoing entities, is eligible to provide consultant services (other than procurement services) to the department for another comprehensive development

agreement project, provided that, once the consultant is retained to perform consultant services for the department, the restrictions in this subsection shall apply.

(13) Restriction of services and conditions to approvals and exceptions. In instances where the executive director has issued a written determination under paragraph (10) of this subsection that a conflict of interest does not exist (including, in particular, where the conditions prescribed in paragraphs (7) and (9) of this subsection have been met), or grants an exception to the application of this subsection under paragraph (10), the department may still, in its discretion:

(A) restrict the scope of services the consultant or subconsultant may be eligible to perform for the department in order to further the intent and goals of this subsection; and

(B) condition an approval, determination, or exception as the executive director determines appropriate to further the intent and goals of this subsection, including by requiring the consultant, subconsultant, proposer, or developer to execute confidentiality agreements, institute ethical walls, or segregate certain personnel from participation in a project or the performance of consultant services.

(14) Provisions are nonexclusive. The provisions in this subsection do not address every situation that may arise in the context of the department's comprehensive development agreement program nor require a particular decision or determination by the executive director when faced with facts similar to those described in this subsection. The department retains the ultimate and sole discretion to determine on a case-by-case basis whether a conflict of interest exists and what actions may be appropriate to avoid, neutralize, or mitigate any actual or potential conflict, or the appearance of any conflict. The provisions of this subsection shall not be construed to preclude or condone any conduct with regard to projects other than projects under a comprehensive development agreement. The department will continue to evaluate other projects based on its traditional conflict of interest standards.

(d) Rules of contact. In order to provide a fair and unbiased procurement process, a request for qualifications, request for proposals, or request for competing proposals and qualifications will contain rules of contact regulating communications between proposers or any of its team members and the commission, the department, and third parties involved in the procurement. Communication includes face-to-face, telephone, facsimile, electronic-mail (e-mail), or formal written communication. The rules of contact become effective upon the issuance of the request for qualifications, request for proposals, or request for competing proposals and qualifications. The rules of contact will include provisions:

(1) prohibiting a proposer or any of its team members from communicating with another proposer or its team members with regard to the project, request for qualifications, request for proposals, or request for competing proposals and qualifications, or either team's qualifications submittal or proposal;

(2) requiring each proposer to designate one or more representatives responsible for contact with the department, and requiring the proposer to correspond with the department regarding the project, request for qualifications, request for proposals, or request for competing proposals and qualifications only through the department's authorized representatives and the proposer's designated representatives;

(3) prohibiting any ex parte communication regarding the project, request for qualifications, request for proposals, or request for competing proposals and qualifications or the procurement with any member of the commission or with any department staff, advisors, contractors, or consultants involved in the procurement until the earliest of the execution and delivery of the comprehensive development agreement, the rejection of all qualifications submittals or proposals by the department, or the cancellation of the procurement;

(4) permitting communications in exceptional circumstances and designating department personnel authorized to approve such communications, and providing that the restrictions on communications shall not preclude or restrict communications with regard to matters unrelated to the request for qualifications, request for proposals, or request for competing proposals and qualifications, or participation in public meetings of the commission or any public or proposer workshop related to the project, request for qualifications, request for proposals, or request for competing proposals and qualifications;

(5) designating a department employee not involved in the procurement to act as an ombudsman who is authorized to receive confidential communications (including questions, comments, or complaints regarding the procurement) and who, after removing, to the extent practicable, any information identifying the proposer, forwards the communications to the employees designated as the department's authorized representatives; and

(6) authorizing the executive director to disqualify a proposer from the procurement and participation in the project at issue or to impose another sanction under §27.9 of this subchapter if it is determined that a proposer has engaged in any improper communications in violation of the rules of contact.

(e) Exceptions to rules of contact. Notwithstanding subsection (d)(1) of this section:

(1) subcontractors that are shared between two or more proposer teams may communicate with members of each of those teams so long as those proposers establish a protocol to ensure that the subcontractor will not act as a conduit of information between the teams; and

(2) the prohibition provided by that subsection does not apply to public discussions regarding the project, request for qualifications, request for proposals, or request for competing proposals and qualifications at any department sponsored informational meetings.

§27.9. Sanctions.

(a) Procedure.

(1) Notification of rules. A copy of this section will be included in each request for qualifications, request for proposals, and request for competing proposals and qualifications issued under this subchapter. Failure to comply with this subsection does not affect the applicability of this section.

(2) Referral to executive director. In determining whether to refer a private entity to the executive director for possible sanctions, the department will consider the criteria set forth in subsection (c)(3) of this section.

(3) Notice of sanctions. The department will notify the private entity of a sanction by certified mail within five days after the executive director's decision to impose the sanction. The notice will summarize the facts and circumstances underlying the sanction, identify the effective date and period of the sanction, and state that the private entity may petition for a hearing within 10 days after receiving notice of the sanction. Except as provided in subsection (b) of this section, a sanction is effective on the date specified in the notice.

(4) Agreed modification of procedure. The procedure for considering a sanction may be modified by agreement of the executive director and the private entity.

(5) Contractual obligations unaffected. The imposition of sanctions does not affect a private entity's obligations under a comprehensive development agreement or any other agreement with the department or limit the commission's contractual remedies thereunder.

(6) Affiliated entities included. References to the term "private entity" also include an affiliate of the private entity, provided that the affiliate is an entity:

(A) which directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with, the private entity or any of its members, partners, or shareholders holding a 10% or greater interest in the private entity; or

(B) for which 10% or more of the equity interest in such entity is held directly or indirectly by the private entity, any of the private entity's members, partners or 10% or greater shareholders or any affiliate of the private entity under subparagraph (A) of this paragraph.

(7) Responsibility for acts of others. The conduct of an individual or other entity acting on behalf of the private entity may be imputed to the private entity.

(b) Opportunity for hearing.

(1) Availability of hearing. The private entity will be given the opportunity for a hearing after receiving notice of a sanction and may petition for a hearing as provided in §1.21 et seq. of this title (relating to Procedures in Contested Cases). The petition must be filed within 10 days after the private entity receives notice of the sanction.

(2) Stay of sanctions pending hearing. A sanction, except a suspension, is automatically stayed from the date a petition for hearing is filed until a final order is entered by the commission. On entry of a final order imposing the sanction or dismissing the hearing, the full term of the sanction will be reinstated as if it were first imposed on the date of the final order unless the commission specifically orders that a lesser sanction be imposed.

(3) Commission discretion. In the public interest, the commission may reduce, eliminate, or modify sanctions imposed under this section at any time.

(4) Exception. The opportunity for a hearing described in subsection (b)(1) of this section does not apply to a private entity that has been sanctioned though the use of a reprimand. In such cases, the private entity may submit written documentation disputing the reprimand to the executive director for further consideration.

(c) Application of sanctions.

(1) Determination of offense. The executive director will determine whether a private entity has committed an act or omission listed under subsection (e)(1) of this section.

(2) Consideration of all circumstances. The existence of grounds for imposing a sanction does not mandate that a private entity be sanctioned. The seriousness of the acts or omissions (including the existence of and elapsed time since previous acts or omissions) and any mitigating circumstances will be considered before sanctions are imposed.

(3) Mitigating circumstances. The executive director will consider mitigating circumstances (or lack thereof) in deciding whether to impose sanctions. Mitigating circumstances may include:

(A) the private entity's culpability;

(B) the level of impact the sanction will have on a particular comprehensive development agreement project;

(C) whether, in light of all facts and circumstances, a severe sanction is necessary to protect the interest of the state and the integrity of the comprehensive development agreement program;

(D) restitution paid by the private entity or a third party for damages suffered by a governmental entity as a result of the private entity's actions;

(E) cooperation by the private entity with a governmental entity in the investigation of bidding crimes, including the provision of a full and complete account of the private entity's involvement; and

(F) the private entity's disassociation from individuals and firms that have been involved in a bidding crime.

(4) Determination of sanction level. The executive director, after consideration of all circumstances (including any mitigating circumstances) will determine a sanction level described in subsection (e)(2) of this section to be imposed on the private entity.

(5) Progressive sanctions. If the private entity has previously been sanctioned, the executive director may use increasingly more severe sanctions in order to achieve the private entity's compliance with department policies and procedures. Every effort will be made to resolve the situation with the imposition of the least severe sanction that is appropriate for the circumstances under consideration. However, in cases where the act or omission is of such a nature that progressive sanction action is not in the best interest of the state or the comprehensive development agreement program, a more severe sanction may be imposed even if such act or omission is the first act or omission by the private entity which warrants sanction action.

(6) Consecutive sanctions. In the case of multiple violations by the same private entity arising out of separate occurrences, the executive director may impose multiple sanctions consecutively and in any order.

(7) Imposition of lesser sanctions. A lesser sanction may be imposed instead of the maximum sanction permitted.

(8) Executive director discretion. In the best interest of the state or the comprehensive development agreement program, the executive director may reduce, eliminate, or modify sanctions at any time.

(d) Suspension.

(1) Grounds. The executive director may immediately suspend a private entity without a prior hearing if the private entity is notified of debarment under subsection (e) of this section.

(2) Duration. A suspension will terminate when a final order is entered after a hearing or when ordered by the executive director.

(e) Sanctions.

(1) Grounds. The executive director may sanction a private entity for the following reasons:

(A) conviction of a bidding crime as defined in §9.101 of this title (relating to Contractor Sanctions), a plea of guilty or nolo contendere to a charge of a bidding crime, or a public admission to a bidding crime, whether made by the private entity or by an individual or other entity that acted on behalf of the private entity;

(B) conviction of the private entity for an offense indicating a lack of moral or ethical integrity, such as bribery or payment of kickbacks or secret rebates to agents of a governmental entity, if the offense reflects on the business practices of the private entity;

(C) commission of acts indicating a lack of moral or ethical integrity and reflecting on the business practices of the private

entity, if the executive director has probable cause to believe that the acts have been committed;

(D) disqualification of the private entity by a state or by an agency of the federal government for any of the reasons listed in this section;

(E) failure of the private entity to notify the department promptly of a conviction of a bidding crime or debarment for any reason by a state or by an agency of the federal government;

(F) the private entity is declared in default on a comprehensive development agreement in accordance with the terms of that agreement;

(G) violation of the conflict of interest provisions applicable to private entities participating in the department's comprehensive development agreement program as set forth in §27.8 of this subchapter (relating to Conflict of Interest and Ethics Policies);

(H) violation of the provision relating to offering, conferring, or agreeing to confer gifts and benefits to department employees as set forth in §27.8 of this subchapter; or

(I) any other grounds described in §9.106(a) of this title (relating to Contractor Sanctions) exist.

(2) Sanction levels. The executive director will determine the level of sanction appropriate for the circumstances under consideration.

(A) Level 1. Reprimand. After four reprimands in one calendar year, any subsequent act or omission committed by the private entity will result in the imposition of a more severe sanction.

(B) Level 2. Prohibition against the private entity's participation in a particular procurement.

(C) Level 3. Debarment of the private entity for a period of no more than 36 months.

(D) Level 4. Permanent debarment of the private entity.

(3) Exception. Debarment under paragraph (2)(D) of this subsection may not be for more than the period of debarment established by the state or federal agency on whose actions the debarment is based.

(4) Use of sanction information. Information pertaining to any sanction(s) imposed against a private entity may be considered by the department during the evaluation of qualification submittals and other proposals submitted by the private entity during a procurement process. Use of this information is limited to sanction action(s) which occurred within 10 years of the date the qualification submittal or other proposal is received by the department.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on November 17, 2006.

TRD-200606246
Bob Jackson
General Counsel
Texas Department of Transportation
Earliest possible date of adoption: December 31, 2006
For further information, please call: (512) 463-8683

ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the the rule (Government Code, §2001.036). If a rule is adopted without change to the text as published in the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 361. CHILDREN'S HEALTH INSURANCE PROGRAM

1 TAC §361.1

The Health and Human Services Commission (HHSC) adopts the repeal of §361.1, Definition of Significant Traditional Provider, from Chapter 361, Children's Health Insurance Program (CHIP), without changes to the proposal as published in the May 19, 2006, issue of the *Texas Register* (31 TexReg 4134) and will not be republished.

Section 361.1 is repealed in order to consolidate all CHIP rules in a single chapter of the Texas Administrative Code, Chapter 370. The text of repealed §361.1 now appears as §370.452 in Chapter 370, State Children's Health Insurance Program.

HHSC did not receive any comments regarding the proposed repeal of the rule during the 30-day comment period, which included a public hearing on May 30, 2006.

The repeal is adopted under the Texas Government Code, §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to implement HHSC's duties under Chapter 531; and the Texas Health and Safety Code, §62.051(d), which directs HHSC to adopt rules as necessary to implement the Children's Health Insurance Program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 17, 2006.

TRD-200606245
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: December 7, 2006
Proposal publication date: May 19, 2006
For further information, please call: (512) 424-6900

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 4. ENVIRONMENTAL PROTECTION

SUBCHAPTER B. COMMERCIAL RECYCLING

16 TAC §§4.201 - 4.226

The Railroad Commission of Texas (Commission) adopts new §§4.201 - 4.226, relating to Purpose; Applicability and Exclusions; Responsibility for Management of Waste to be Recycled; Definitions; General Permit Application Requirements for Commercial Recycling Facilities; Minimum Engineering and Geologic Information; Minimum Siting Information; Minimum Real Property Information; Minimum Design and Construction Information; Minimum Operating Information; Minimum Monitoring Information; Minimum Closure Information; Notice; Administrative Decision on Permit Application; Protests and Hearings; Standards for Permit Issuance; General Permit Provisions; Minimum Permit Provisions for Siting; Minimum Permit Provisions for Design and Construction; Minimum Permit Provisions for Operations; Minimum Permit Provisions for Monitoring; Minimum Permit Provisions for Closure; Permit Renewal; Exceptions; Modification, Suspension, and Termination; and Penalties, in 16 Texas Administrative Code, Chapter 4, new Subchapter B to be entitled "Commercial Recycling." The Commission adopts §§4.201, 4.203, 4.208, 4.213, 4.215, 4.223, 4.225, and 4.226 without changes, and adopts §§4.202, 4.204, 4.205, 4.206, 4.207, 4.209, 4.210, 4.211, 4.212, 4.214, 4.216, 4.217, 4.218, 4.219, 4.220, 4.221, 4.222, and 4.224 with changes to the proposed versions published in the June 2, 2006, issue of the *Texas Register* (31 TexReg 4543). The Commission adopts the new rules in response to a petition for rulemaking concerning commercial recycling facilities, and based on its experience with permitting such facilities over the past several years.

On November 14, 2005, the Commission received a petition for rulemaking submitted by US Liquids of La., L.P. (petitioner), pertaining to permit applications, general siting, construction, operation, and closure requirements for commercial oil and gas waste recycling facilities. On January 10, 2006, the Commission directed staff to initiate a limited rulemaking proceeding pursuant to Texas Government Code, §2001.021, and 16 Texas Administrative Code §1.21 in response to the petition.

The petitioner recommended that the new language be added to the Commission's rules in Chapter 4, relating to Environmental Protection.

It is the policy of the Commission to encourage such use or reuse of oil and gas wastes for beneficial purposes. As the agency solely responsible for the prevention and abatement of surface and subsurface water pollution attributable to oil and gas waste

or other substances and materials generated by activities the Commission regulates, it must ensure that the storage, handling, treatment, and recycling of oil and gas wastes and recyclable product do not threaten or impair the environment or public health and safety.

The petitioner included fairly detailed suggestions, generally based on the Commission's current application and permitting practices for stationary commercial recycling facilities, at which oil and gas waste is treated or processed to create a recyclable product, such as road base. The Commission incorporates into the new rules the Commission's current application and permitting practices for commercial oil and gas waste recycling facilities, including general siting, construction, operation, and closure requirements for such facilities.

To successfully recycle waste, there must be a market for the recyclable product. In the absence of a legitimate market for the recyclable product, there is an increased likelihood that the recyclable product will become valueless and will, therefore, not be used. In this case, the recyclable product then would become a waste that must be managed. Accordingly, the new rules require permits for commercial recycling facilities to contain provisions to ensure that the recyclable product has characteristics consistent with legitimate commercial products or ingredients, to control how much of the recyclable product may accumulate through the record keeping and reporting requirements, and to limit the storage of recyclable product. These conditions are intended to ensure that the recyclable product can be and is used and not abandoned or disposed of, and that the feedstock oil and gas waste, the partially treated waste, and the recyclable product do not threaten or impair the environment or public health and safety.

New §4.201, relating to Purpose, is adopted without change and states that the purpose of new Subchapter B is to establish minimum requirements for the recycling of oil and gas wastes at a commercial recycling facility for the purpose of protecting public health and safety and the environment within the scope of the Commission's statutory authority. The new subchapter prohibits any person conducting activities under the subchapter from causing or allowing pollution of surface or subsurface waters of the state.

New §4.201(c) states that the provisions of the new subchapter do not supercede other Commission regulations relating to oilfield fluids or oil and gas wastes.

The Commission adopts new §4.202, relating to Applicability and Exclusions (changed from Applicability and Exceptions), to state that new Subchapter B applies to mobile and stationary commercial recycling facilities, but does not apply to recycling methods authorized for certain wastes by other Commission rules, or to recycling facilities regulated by entities other than the Commission, such as those regulated by the Texas Commission on Environmental Quality.

The Commission adopts without change new §4.203, relating to Responsibility for Management of Waste to be Recycled, which states that a Commission permit is required to operate a commercial recycling facility and that hauling of oil and gas waste to a commercial recycling facility requires an oil and gas waste hauler permit pursuant to §3.8(f) of this title, relating to Water Protection. In addition, a person who plans to use the services of a commercial recycling facility has a duty to determine that the commercial recycling facility has all the necessary Commission permits.

The Commission adopts with changes new §4.204, relating to Definitions, which defines certain terms used in the subchapter. This section also provides that, unless a word or term is defined differently in this section, the definitions in §3.8 of this title, relating to Water Protection, §3.98 of this title, relating to Standards for Management of Hazardous Oil and Gas Waste, and §4.603 of this chapter, relating to Oil and Gas NORM, apply in Subchapter B.

The Commission defines "100-year flood plain" to mean an area that is inundated by a 100-year flood, which is a flood that has a one percent or greater chance of occurring in any given year.

The Commission defines "adjoining" to identify tracts for which the surface owners are entitled to notice of a permit application under this subchapter.

The Commission defines "commercial recycling facility" to mean a mobile or stationary facility whose owner or operator receives compensation from others for the storage, handling, treatment, and recycling of oil and gas wastes and the primary business purpose of which is to provide these services for compensation, whether from the generator of the waste, another receiver, or the purchaser of the recyclable product produced at the recycling facility.

The Commission defines "Commission" to mean the Railroad Commission of Texas.

The Commission defines "Director" as the director of the Commission's Oil and Gas Division or the director's delegate.

The Commission defines two analytical methods proposed for use by a commercial recycling facility. These methods are "EPA Method 1312, Synthetic Precipitation Leaching Procedure (SPLP)" and the "Louisiana Department of Natural Resources Leachate Test Method," which are used to evaluate leaching of constituents to subsurface water.

The Commission defines "legitimate commercial use" to mean use or reuse of a recyclable product as defined in a permit issued pursuant to this subchapter as an effective substitute for a commercial product or as an ingredient to make a commercial product; or as a replacement for a product or material that otherwise would have been purchased; and in a manner that does not constitute disposal.

The Commission defines "mobile commercial recycling" to mean commercial recycling that is restricted in the amount of time and/or volume of waste that may be processed at any one location and that is performed using equipment that moves from location to location.

The adopted definition of "mobile commercial recycling" differs from the proposed definition. The adopted definition adds elements to emphasize that mobile commercial recycling will occur in conjunction with exploration and production activities on a lease or well site on such a relatively small scale that the recycling operation in the field will be more a part of the exploration and production activities than a separate stand alone activity.

The Commission does not intend for mobile commercial recycling in the oil field to add materially to the typical footprint of exploration and production activities. The Commission has permitted three mobile commercial recycling operations, two for the treatment and reuse of drilling mud and cuttings, and one for the treatment (in skid-mounted distillation units) and reuse of hydraulic fracturing flow-back water.

The permits for the mobile commercial recycling of drilling mud and cuttings include limits such as the amount of time the waste can be stored at the drill site, the number of wells from which mud and cuttings may be accepted for treatment and reuse, and identifies the specific area at the well site for recycling. In addition, the permits require permittee to reuse (put to "legitimate commercial use" under the adopted rules) all processed material ("recyclable product" under the adopted rules) or, if not reused, to dispose of it in compliance with Commission rules.

The permit for the mobile commercial recycling of hydraulic fracturing flow-back water limits the time the skid-mounted distillation units may be on one site to ten months, provides that permittee must place and keep the on-site skid-mounted distillation unit on an oil and gas lease owned by the operator who generates the fracture flowback water to be treated, and the permittee/unit may only treat fracture flowback water generated by the operator of the lease where the unit is placed. The permit limits the amount of waste solids and concentrated brine that may be accumulated at the site at any one time.

The Commission will require an operator applying for a recycling operation that does not meet the criteria for mobile recycling under the rules to apply for a stationary commercial recycling facility permit.

The Commission defines "oil and gas waste" consistent with the definition of oil and gas waste in Texas Natural Resources Code, §91.1011.

The Commission defines "partially treated waste" with changes from the proposed rule, to clarify and correct grammar. As adopted, "partially treated waste" means oil and gas waste that has been treated or processed with the intent of being recycled, but which has not been determined to meet the environmental and engineering standards for a recyclable product established by the Commission in this subchapter or in a permit issued pursuant to this subchapter.

The Commission defines "recyclable product" to mean a reusable material that has been created from the treatment and/or processing of oil and gas waste as authorized by a Commission permit and that meets the environmental and engineering standards established by the permit for the intended use as a legitimate commercial product. A recyclable product is not a waste, but may become a waste if it is abandoned or disposed of rather than recycled as authorized by the permit.

The Commission defines "recycle" to mean to store, handle, and/or treat oil and gas wastes for use or reuse as, or for processing into, a product for which there is a legitimate commercial use.

The Commission defines "stationary commercial recycling facility" as a commercial recycling facility in an immobile, fixed location.

The Commission declined the petitioner's recommendation that the Commission define the term "treat" in the rule in such a way as to require that organic liquids be separated out to an undiluted maximum concentration limit of five (5) percent total petroleum hydrocarbons (TPH) in order for oil and gas waste to be recycled as road base. The adopted new rules do not include this recommendation because market forces will ensure that marketable crude oil will be removed from any waste that would be taken to a recycling facility. Furthermore, the hydrocarbon content of the oil and gas waste to be taken to these facilities is oftentimes the characteristic that makes the waste suitable for the intended use, particularly for the use of the recyclable product as road base.

The petitioner further suggested that the Commission define total petroleum hydrocarbons, or TPH, to include hydrocarbon chains up through C40. The proposed amendments did not include such a definition because the analytical method used to determine TPH content defines total petroleum hydrocarbons. The Commission will require that a permittee use the Louisiana Department of Natural Resources leachate test to determine whether or not a treated and/or processed material meets the TPH criteria as a recyclable product for uses such as road base. This test method and TPH limit is specific to treated and/or processed materials destined for recycling as road base.

The application requirements generally parallel the Commission's current permit application practices for commercial recycling facilities. The Commission adopts both §4.205 and §4.206 with changes, most significantly that the rules specifically identify the application requirements for mobile and stationary facilities, because several commenters suggested clarifying the provisions that apply to each type of facility. Throughout the adopted rules, the Commission identifies provisions that apply to stationary facilities, to mobile facilities, or to both. A rule that does not state that it applies to a particular type of facility applies to both mobile and stationary facilities.

The Commission adopts with change new §4.205, relating to General Permit Application Requirements for Commercial Recycling Facilities, which will require that an applicant for a mobile or stationary commercial recycling facility permit file the application with the Commission's headquarters office in Austin and send a copy to the Commission district office for the county in which the facility is to be located; that the application contain the operator name organizational report number, physical, mailing, and facility addresses (if the facility is a stationary commercial recycling facility), telephone and fax numbers, and the name of a contact person; and that the application contain an original signature in ink, the date of signing, and a certification, which is set forth in the rule text. This rule also requires that an application must be complete before it may be administratively processed or referred for hearing.

The Commission adopts with change new §4.206, relating to Minimum Engineering and Geologic Information, which incorporates the current Commission practice of requesting any engineering, geological, or other information which the director deems necessary to show that issuance of a permit for a mobile or stationary commercial recycling facility will not result in waste of oil, gas, or geothermal resources, the pollution of surface or subsurface water, or a threat to the public health and safety. The new section will require that all engineering and geologic work prepared by the applicant be sealed by a registered engineer or geologist, respectively, as required by the Texas Occupations Code, Chapters 1001 and 1002.

The Commission adopts with change new §4.207, relating to Minimum Siting Information, which outlines the minimum siting information required to be submitted with an application for a stationary commercial recycling facility permit. This information includes a description of the proposed facility site and the surrounding area; the name and physical address, and phone and fax numbers of the owner or owners of the tract on which the proposed facility is to be located; the depth to the shallowest fresh water and direction of groundwater flow; the average annual precipitation and evaporation at the proposed site; information concerning the soil and subsoil; a copy of a county highway map

showing the proposed facility location; and a topographic map showing the outline of the proposed facility, any pipelines that underlay the facility, and the location of the 100-year flood plain in the area. The Commission did not include mobile commercial recycling facilities in this section because the mobile recycling operator generally will perform the recycling on a producer's oil and gas lease and therefore will not have as much flexibility as a stationary operator to select ideal siting conditions. However, the Commission intends to continue to incorporate into the permits for mobile commercial recycling facilities conditions that address general siting concerns.

The Commission adopts without change new §4.208, relating to Minimum Real Property Information, will require in any permit application for a stationary commercial recycling facility a plat showing the section and survey name and abstract number; the site coordinates; a clear outline of the boundaries of the proposed facility; all tracts, and the names of the owners of those tracts, that adjoin the tract upon which the facility is proposed to be located; and the distance from the proposed facility's outermost perimeter boundary to any water wells, residences, schools, churches, or hospitals within 500 feet of the proposed site.

The Commission adopts with change new §4.209, relating to Minimum Design and Construction Information, outlines the minimum construction information required to be submitted with an application for a mobile or stationary commercial recycling facility permit, including the location and information on the design and size of all receiving, processing, and storage areas and all equipment, tanks, silos, monitor wells (for stationary commercial recycling facilities), dikes, and access roads. Also to be required is a description of the types and thickness of liners for all tanks, silos, and storage areas; a map view of the storage areas, a plan for installation of the monitor wells, and a plan to control and manage storm water runoff and to retain wastes during wet weather.

The Commission adopts with change new §4.210, relating to Minimum Operating Information, outlines the operating information required to be submitted with an application for a mobile or stationary commercial recycling facility permit. This information includes estimated volume of waste, partially treated waste, and recyclable product to be stored at the facility; a detailed waste acceptance plan, including testing of the waste to ensure acceptance of only authorized oil and gas waste; record keeping; a general description of the recycling process and all equipment and chemicals to be used in the process; a description of any testing to be performed to demonstrate that the proposed processing will result in a recyclable product that meets engineering and environmental standards for the proposed use; and an estimate of the duration of the operation of the proposed facility. The provision regarding testing is new in the adopted rule, and was added to advise permit applicants and the public that the Commission will expect an applicant to identify the particular engineering and environmental test(s) he or she will use to demonstrate that "partially treated waste" meets the permitted standards for "recyclable product."

The Commission adopts with change new §4.211, relating to Minimum Monitoring Information, outlines the minimum monitoring information the applicant is required to submit to the Commission, including a plan for sampling the partially treated waste to ensure compliance with permit conditions; a plan for sampling any monitoring wells at a stationary commercial recycling facility; and a plan and schedule for conducting periodic inspections.

The Commission adopts with change new §4.212, relating to Minimum Closure Information, which outlines the minimum closure information the applicant for a mobile or stationary commercial recycling facility is required to submit to the Commission, including how the applicant proposes to remove waste, partially treated waste, and/or recyclable product; close all storage areas; and remove dikes and, for a stationary commercial recycling facility, sample and analyze soil and groundwater; plug monitor wells; and contour and reseed disturbed areas.

The Commission adopts without change new §4.213, relating to Notice, to incorporate the Commission's current requirements for providing published and personal notice of an application for a stationary commercial recycling facility. An applicant is required to provide published notice of an application for a commercial recycling facility in a newspaper of general circulation in the county in which the proposed facility will be located at least once a week for two consecutive weeks. An applicant also is required to give personal notice to the surface owner of the tract upon which the facility will be located; surface owners of tracts within a minimum of one-half mile of the outermost boundary of the proposed facility; the city clerk, if the tract is within the corporate limits of an incorporated city, town, or village; and any other person or class of persons that the director determines should receive notice of a particular application. The new section outlines the contents of the published and personal notice; instructs the applicant on delivery of the personal notice; and requires submission to the Commission of proof that the applicant has given the required notice.

The Commission adopts with a minor clarifying change new §4.214, relating to Administrative Decision on Permit application, which incorporates the Commission's current practice and requirements relating to administrative approval or denial of a permit application for a commercial recycling facility.

The Commission adopts without change new §4.215, relating to Protests and Hearings, which incorporates the Commission's current requirements concerning filing and receipt of protests, and notice and holding of hearings on a permit application for a commercial recycling facility.

The Commission adopts with change new §4.216, relating to Standards for Permit Issuance, which incorporates the Commission's current standards for determining whether to issue a permit for a mobile or stationary commercial recycling facility. The Commission may issue such a permit only if the activity will not result in waste of oil, gas, or geothermal resources, the pollution of surface or subsurface waters, or a threat to public health and safety, and if the recyclable product is capable of performing in its intended use.

The Commission adopts with change new §4.217, relating to General Permit Provisions, to incorporate the Commission's current practice of issuing a permit for a mobile or stationary commercial recycling facility for a term of no more than five years; limiting the waste to be received, stored, handled, treated or recycled to waste that is under the jurisdiction of the Commission, that is not a hazardous waste as defined by the Environmental Protection Agency and that is not oil and gas naturally occurring radioactive material (NORM) waste; requiring that a stationary commercial recycling facility comply with the financial security requirements of Texas Natural Resources Code, §91.109, relating to Financial Security for Persons Involved in Activities Other than Operation of Wells, as implemented by §3.78 of this title, relating to Fees and Financial Security Requirements; and, in new subsection (d), requiring that a permit for a mobile commercial

recycling facility include a condition requiring that the permittee notify the surface owner of the tract upon which recycling will take place and the appropriate Commission district office before recycling operations commence on each tract.

The Commission adopts with changes new §4.218, relating to Minimum Permit Provisions for Siting, which incorporates the Commission's standards for siting of a commercial facility. The adopted new section is different from the proposed version primarily because instead of establishing a 500 foot setback requirement, the rule establishes factors that will be considered in determining potential restrictions on the location of a commercial recycling facility from any area where there is an unreasonable risk of pollution or where there is a threat to pubic health or safety. Factors that the Commission will consider in determining potential risk include the volume and type and characteristics of the oil and gas waste, partially treated waste and recyclable product, the depth to and quality of the shallowest groundwater, the distance to the nearest property line or public road, and proximity to a water supply or domestic or irrigation water well, a coastal natural resource area as defined in §3.8 of this title, relating to Water Protection, and a sensitive area, as defined by §3.91 of this title, relating to Cleanup of Soil Contaminated by a Crude Oil Spill. As defined in §3.91, a sensitive area is defined by "the presence of factors, whether one or more, that make an area vulnerable to pollution from crude oil spills. Factors that are characteristic of sensitive areas include the presence of shallow groundwater or pathways for communication with deeper groundwater; proximity to surface water, including lakes, rivers, streams, dry or flowing creeks, irrigation canals, stock tanks, and wetlands; proximity to natural wildlife refuges or parks; or proximity to commercial or residential areas." Because it is probable that location of a commercial recycling facility in a sensitive area would present an unreasonable risk to the environment and/or public health and safety, the Commission is not likely to issue a permit for such a facility. The Commission further prohibits location of a stationary commercial recycling facility within a 100-year flood plain. The Commission further includes language to clarify that the siting requirements for distance offsets for a stationary commercial facility refer to conditions at the time the facility is constructed.

The petitioner recommended that the Commission include in the rule a specific prohibition against siting a commercial recycling facility within 500 feet of a water supply or domestic water well or within 1,000 feet of a church, school or hospital. With respect to distances between a commercial recycling facility and a church, school, or hospital, the Commission currently requires in any application for a commercial recycling facility, and proposes to incorporate such requirement into new Subchapter B, information concerning the location of churches, schools and hospitals within 500 feet of the proposed commercial recycling facility, but does not currently impose a specific restriction on the distance. The Commission agrees that there is value in knowing about the distance of commercial facilities from such structures and/or wells; however, the Commission finds that including a specific distance restriction in this rulemaking is not necessary because the Commission will receive sufficient information in each application to make an informed determination of the potential for unreasonable risk to human health and safety and the environment on a case-by-case basis.

The Commission adopts with change new §4.219, relating to Minimum Permit Provisions for Design and Construction, to incorporate the Commission's current performance standard for the design and construction of a commercial recycling facility. A commercial recycling facility must be designed and constructed such that contact of oil and gas wastes, partially treated waste, and recyclable product with the ground surface, surface water, and subsurface water is minimized. Any permit for a commercial recycling facility will include conditions necessary to ensure that this performance standard is met, including installation of monitor wells at stationary commercial recycling facilities, and any necessary provisions to guard against pollution from spills, leachate, and/or discharges from the facility. The petitioner recommended that the Commission require that incoming waste be stored in above-ground tanks, and that other storage at such facilities be in lined or concrete cells. The Commission declined to add such a restrictive requirement, preferring to determine on a case-by-case basis requirements for ensuring that the performance standard is met.

The Commission adopts with change new §4.220, Minimum Permit Provisions for Operations, to incorporate the Commission's current practices relating to the operation of commercial recycling facilities. A permit for a mobile or stationary commercial recycling facility will include requirements that the Commission determines are reasonably necessary to ensure that only authorized wastes and other materials are received at the facility and to ensure that the processing operation and the resulting recyclable product meet the environmental and engineering standards established in the permit. The Commission also adopts a provision that the permittee may have to perform a trial run prior to full operation of the facility to ensure that the equipment and methods used by the permittee will result in a recyclable product that meets the engineering and environmental standards established in the permit by the Commission, consistent with the Commission's current practice. In addition, the Commission will include in any permit issued under this section any conditions, including volume restrictions, it determines to be reasonably necessary to ensure that speculative accumulation of oil and gas waste, partially treated waste, and recyclable product does not occur.

The petitioner recommended that the Commission place specific limitations on the volumes of oil and gas wastes based on the volume of recyclable product actually used. The Commission declined to include in the rule a specific volume restriction, but intends to continue its current practice of including in the permits for commercial recycling facilities volume limits that are determined on a case-by-case basis.

The petitioner also recommended that the Commission place limits on the amount of recyclable product that could be used on the property of the owner of the surface estate of the tract on which the commercial recycling facility is located. The Commission declined to include such a restriction because the Commission anticipates that adherence to the provisions of permits issued pursuant to this subchapter will result in the production of recyclable products that perform as intended and do not pose an unreasonable risk to public health, safety or the environment. In addition, the definition of recycling will require the "legitimate commercial use" of the recyclable product. Use of the recyclable product in a manner that is not "legitimate commercial use" would be disposal, which is not authorized by the recycling permit. Such disposal without a permit would subject the permittee of the recycling facility to Commission enforcement, which could include permit revocation or suspension, as well as penalties.

The Commission adopts with change new §4.221, relating to Minimum Permit Provisions for Monitoring, which incorporates the Commission's current requirements for ensuring that the recyclable product meets the standards established by the Com-

mission and included in the rule and permit, by requiring periodic sampling and analysis of "batches" of partially treated waste by a third party laboratory. The Commission also incorporates into this new section a statement that the Commission will establish standards for recyclable product based on the type of waste received at a particular commercial recycling facility and the intended use of the recyclable product from that facility. In addition, the Commission incorporates into new subsection §4.221(b) its current the standards for recyclable product intended to be used as road base, as requested by the petitioner.

The Commission adopts with change new §4.222, relating to Minimum Permit Provisions for Closure, to incorporate the Commission's current requirements for closure of a commercial recycling facility.

The Commission adopts without change new §4.223, relating to Permit Renewal, which sets forth the Commission's current practices relating to renewal of a mobile or stationary commercial recycling facility permit. All applications to renew a commercial recycling facility permit issued pursuant to either §3.8 of this title (relating to Water Protection) or this new subchapter, must be submitted to the Commission in writing at least 60 days before the permit is scheduled to expire and the renewal application must comply with the requirements of §4.205 of this title, relating to General Permit Application Requirements for Commercial Recycling Facilities, and the notice requirements in new §4.213, relating to Notice. The applicant for permit renewal may be required to comply with the other application requirements in the subchapter, if the permittee has made, or plans to make, any changes that would impact the information currently on file with the Commission regarding the construction, operation, monitoring, and/or closure of the facility. In addition, the Commission will include in any renewal permit for a commercial recycling facility any conditions necessary to comply with the requirements in effect at the time of renewal, consistent with the Commission's current practice. For example, any permit issued to renew an earlier permit that does not currently require monitor wells would include such a requirement.

The Commission adopts with change new §4.224, relating to Exceptions, to allow an applicant or permittee to request an exception to provisions of the new subchapter. Such request must be in writing, must be submitted to the Commission, and must demonstrate that the requested exception is at least equivalent in the protection of public health and safety and the environment as the provisions of this subchapter to which the applicant or permittee is seeking an exception. The Commission will review each written request on a case-by-case basis. The change from the proposed version is a grammatical correction in the first sentence.

The Commission adopts without changes new §4.225, relating to Modification, Suspension, and Termination, consistent with current practices and existing §3.8, relating to Water Protection.

The Commission adopts without changes new §4.226, relating to Penalties, to advise persons that violations of this subchapter may subject the person to penalties and remedies specified in the Texas Natural Resources Code.

The petitioner recommended that the Commission include permit revocation procedures for chronic violators. The Commission declined to include specific language that would apply exclusively to owners and operators of commercial recycling facilities that are chronic violators because the Commission's current enforcement procedures pertain to all violators, including chronic violators and violators of all Commission regulations.

The petitioner also recommended that the Commission include in the rules a statement that generators of oil and gas wastes that are recycled in accordance with these rules are released from liability from prosecution by the Commission. The Commission declined to add language specific to oil and gas waste that is recycled at a commercial recycling facility. Other Commission rules and permits authorize recycling. For example, §3.8 authorizes the use of used drilling fluid from one well to "spud" another well. The Commission historically holds liable for remediation any entity determined to be responsible for any contamination based on evidence as a result of any type of waste management, including improper "recycling," that results in contamination. If a generator of an oil and gas waste takes that waste to a commercial recycling facility and knows or should have known that the oil and gas waste would be improperly treated/processed and/or disposed of, rather than recycled, then the Commission reserves the option of enforcing against all parties if the result were pollution. In addition, the process established by this subchapter is intended to result in oil and gas waste becoming a legitimate commercial product. So long as generators, haulers, and recyclers adhere to the provisions of this subchapter, generators should be confident that potential liability for waste taken to a Commission recycling facility is, in fact, significantly minimized. A "recyclable product" put to legitimate commercial use is not a waste. The Commission specifically requested comments on release of liability issues, including citation to legal authority.

The Commission received comments from one group or association (Texas Oil and Gas Association (TxOGA)), five companies (Boundary Ventures, Inc., Newpark Resources, Inc., North American Environmental Services, Inc., Osage Environmental, Inc., and U.S. Liquids of Louisiana), and two individuals (Mr. Blake Scott and Mr. Norvell Wisdom).

TxOGA supports the Commission's proposal. Boundary Ventures applauds the Commission on its continued efforts to benefit Texas and all Texans. U.S. Liquids of Louisiana very much appreciates the efforts by the Commissioners and the staff in drafting this rulemaking, which, for the most part, goes a long way toward our intent to make requirements consistent for all those desiring to recycle oil and gas wastes into a usable product and toward protecting the environment. The Commission appreciates these comments.

Two commenters stated that the proposed rules are not sufficiently specific or comprehensive. The Commission disagrees with this comment. As proposed and adopted, the rules strike a balance between sufficient specificity to advise the public what the Commission expects of a commercial recycling operator and enough flexibility to account for individual circumstances, including, but not limited to, assuring that the regulations apply to as many different types of oil and gas waste commercial recycling operations and products as reasonably possible.

One commenter stated that the organization of the proposed rules is not user-friendly because the rules include provisions concerning the same subject matter in different sections. In addition, this commenter recommended that the Commission include a section entitled "General Requirements for Generators of E & P Waste," and include reporting requirements and due dates for reports. The Commission disagrees with these comments. Although there are numerous potential ways to reasonably organize the rules, the Commission finds that the organization of the rules according to the chronology of the permitting process

(application, notice, protest and hearing, permit issuance, operations, renewal, and closure) is logical. The Commission disagrees that these rules should include a section for generators because the rules apply to recycling facility operators, not generators. The Commission also finds, based on experience, that specific reporting and due date requirements are best addressed in individual permits.

One commenter suggested that the proposed subchapter poses an adverse economic impact on commercial recycling facilities because its focus is limited to recycling rather than all facilities engaged in oil and gas waste management and because it sets higher standards and impose more costs on commercial recycling facilities and would result in an unfair competitive advantage for traditional oil and gas waste disposal operations. The Commission disagrees with these comments. Even though the petition for rulemaking and the actual rulemaking were limited to recycling, in most cases, the environmental and health protection standards included in this subchapter are the same or very similar to the standards imposed on commercial oil and gas waste disposal facilities governed by §3.8 of this title, relating to Water Protection (also called "Statewide Rule 8").

One commenter expressed concern with the broad wording of §4.201(c), related to Purpose, and suggested that the Commission add a clause at the end of the proposed section stating: "except when material that was once oil and gas waste no longer is such waste as a result of processing in accordance with a permit issued under this subchapter or when a provision of this subchapter is necessarily inconsistent with a provision of a previously issued regulation." The Commission proposed §4.201(c) to read as follows: "The provisions of this subchapter do not supersede other Commission regulations relating to oil field fluids or oil and gas waste." The Commission finds that the proposed wording is clear and makes no change in response to this comment.

Two commenters recommended that the definitions for the terms "commercial recycling facility," "recyclable product," and "recycle" not include storage and handling, because federal law has distinct definitions for storage, handling, and treatment, and materials have been recycled only if, through treatment, they are physically, chemically, or biologically distinct from the original material. The Commission agrees that federal law may have distinct definitions for "storage," "handling," and "treating," but does not agree that the proposed rules need to conform definition by definition to federal programs. The Commission, which is solely responsible for the prevention and abatement of surface and subsurface water pollution attributable to activities the under the Commission's jurisdiction, proposed and adopts these rules under state law. The language of the rules is consistent with the Commission's state statutory authority, and consistent with the ordinary meanings of the words "storage," "handling," and "treating." In addition, recyclable products must meet engineering and environmental standards for legitimate commercial use.

One commenter stated that, in the definition of "commercial recycling facility," it appears debatable whether the second instance of the word "whose" has for its antecedent "facility" or "owner or operator." If the latter meaning is taken, there appears to be a "loophole" that is probably not intended, specifically that a very large owner could construct or buy a facility that would not be included in this definition because the "storage, handling, treatment, and recycling of oil and gas wastes" would not be the owner or operator's "primary business purpose." This commenter recommended deleting the words "and whose primary business purpose is" and substituting, "the primary business purpose of said facility being." The Commission agrees that the proposed language could have been interpreted in a manner other than that intended and has made changes to clarify the intent, although the changes are not those suggested by the commenter.

Two commenters recommended that the Commission add a definition for "abandoned." The Commission declines to make the recommended change, finding that the ordinary meaning of the word "abandoned" is generally understood.

Two commenters requested that the Commission clarify the definition of "EPA Method 1312, Synthetic Precipitation Leaching Procedure (SPLP)" to indicate that this method applies to both metals and benzene, and define and use in the rules "TXDOT Special Specification 3157." The Commission agrees in part with these comments. The Commission has revised the definition of "EPA Method 1312, Synthetic Precipitation Leaching Procedure (SPLP)" to include a reference to benzene. The Commission declines to add a definition for "TXDOT Special Specification 3157" and use that term in the rules, but has revised the language concerning testing of partially treated waste for compressive strength to allow the use of any appropriate approved Texas Department of Transportation method to determine compressive strength. The Commission decided not to include specific test methods for compressive strength in the rules because the Texas Department of Transportation, which establishes compressive strength testing for road base materials, has a history of changing the tests it will accept, and may allow different tests for different uses. For example, one test may apply to a county road, and another may apply to a state highway. However, the Commission revised §4.210, relating to Minimum Operating Information, to add a requirement that an applicant for a mobile or stationary commercial recycling facility provide a description of any testing to be performed to demonstrate that the proposed processing will result in a recyclable product that meets the engineering and environmental standards for the proposed use.

These commenters also recommended that the Commission revise the definition of "100-year flood plain" to include reference to the Federal Emergency Management Agency (and its Flood Insurance Rate Maps), or the National Flood Insurance Program. The Commission disagrees with this comment. The Commission's experience is that the Federal Emergency Management Agency (FEMA) has not mapped all the 100-year flood plains.

One commenter advised that, in the definition of "legitimate commercial use," it appears that the word "an" has been inadvertently omitted between "as" and "effective" at the beginning of this section. The Commission agrees and has made the suggested change.

This commenter also suggested that the phrase "and/or structure" be inserted after both instances of the word "product" in order to make it clear that macro-scale structures can be appropriate uses for a recyclable product. This commenter also suggested that in §4.204(7)(B), the words "product or material" be changed to "product, material, and/or structure," again to make clear that macro-scale structures can be appropriate uses as recyclable product. The Commission does not agree that the suggested change is necessary because the applicability of the rule is sufficiently broad to cover many potential uses for recyclable products.

This commenter further suggested that the word "commercial" be inserted before the second instance of the word "product," inasmuch as this is presumably the intended meaning and it

is grammatically debatable whether this word inherently "distributes" its meaning to the second instance of "product." The Commission agrees with this comment and has made the suggested changes.

This commenter suggested that the phrase "and/or" be added at the end of the proposed language, because the conjunction "and" from the end of §4.204(7)(B) would normally be consider grammatically to distribute itself to the end of subparagraph (A), resulting in a presumably unintended requirement for use both as an effective substitute and as a replacement, to whatever extent these two meanings are considered different. The Commission partially agrees with these comments. The Commission agrees that the definition needs clarification and has added "or" after subparagraph (A).

With respect to the definition of "legitimate commercial use," one commenter recommended deletion of the phrase "ingredient to make a product" in the definition to eliminate a potential loophole in the recycling regulations that could be taken advantage of by persons that want their material to be classified as a recyclable product and not as an oil and gas waste. The Commission declines to make the suggested change as it is possible that a recyclable product made using oil and gas wastes could be used as an ingredient to make a commercial product and the Commission desires to make the applicability of rule sufficiently broad to encourage legitimate recycling.

TxOGA commented that the definition of "oil and gas wastes" in this rule includes the term "pressure maintenance plants, or repressurizing plants," which comes from the Natural Resources Code, but which is defined only in 16 TAC §3.98, relating to Hazardous Oil and Gas Waste. The term is used in the definition of activities for which hazardous wastes from oil and gas operations are under Texas Commission on Environmental Quality's jurisdiction. For clarity in Chapter 4, TxOGA recommended that the definition of "pressure maintenance plant or repressurizing plant" from §3.98(b)(48) be included in §4.204. In response to this comment, and for the sake of consistency, the Commission has included a reference to §3.98, relating to Standards for Management of Hazardous Oil and Gas Wastes, in the clarifying language to §4.204, so that the term "pressure maintenance plant or repressurizing plant" is defined as it is in §3.98. In addition, the Commission has added a reference to §4.603 of Subchapter F of this chapter, relating to Oil and Gas NORM.

One commenter suggested that in the definition of "recyclable product," the word "consistently" at the end of third line be changed to "actually." This commenter also suggested that the Commission add a clause at the end of the first sentence, to read as follows: "or is the subject of a bona fide order from a customer of the operator of the recycling facility," so that normal accumulations before shipment to a site of use or reuse are allowable, any risk that might be feared to arise from this practice being effectively avoided by the subsequent sentence of this subsection, which itself is suggested to be modified by substituting the words "A recyclable product as defined in the first sentence of this section is not a waste, but any product asserted to be a recyclable product by reason of the first sentence of this subsection section is in fact" for the existing language.

The Commission partially agrees with the commenter. In order to remove any confusion, the Commission has deleted the word "consistently" in the first sentence of the definition. The Commission declines to make the other suggested changes because the Commission finds that the language is sufficiently clear without the changes.

One commenter recommended that the Commission include in the rules a new definition for "recyclable product used as road base." This commenter expressed a concern that the term "recyclable product" will be diminished without reference to product identification and testing and suggested the following language: "Recyclable product used as road base--A material that is composed of oil and gas waste and stabilization materials that: (A) has been processed and tested in accordance with a permit issued under this subchapter; and (B) that meets Texas Department of Transportation standards for road base materials." The Commission declines to add the suggested definition because the Commission drafted the proposed rules to cover recycling activities for road base as well as for other purposes, and because the concept of recyclable product used as road base is adequately discussed in §4.221.

One commenter suggested that in §4.205(b), relating to General Permit Application Requirements for Commercial Recycling Facilities, the Commission insert the phrase, "if the application is for a stationary facility" between the words "facility address" and the semicolon punctuation mark immediately following this words, because a mobile facility will not usually have an address. The Commission agrees and has revised this subsection, although not exactly as suggested by the commenter.

One commenter stated that §4.206, relating to Minimum Engineering and Geologic Information, and §4.207, relating to Minimum Siting Information, conflict because §4.206 provides that the director *may* require an applicant to provide engineering, geological or other information, and §4.207 provides that certain specific siting information *shall* be provided.

The Commission disagrees with this comment. Section 4.207 applies to only stationary facilities so that the language can be clear on what the Commission "shall" require. However, §4.206 applies to both mobile and stationary commercial recycling facilities, for which certain requirements may or may not be applicable depending on the circumstances; the Commission adds clarifying wording to §4.206 referring to a mobile or stationary commercial recycling facility.

One commenter recommended that the Commission revise the rules to require an applicant to perform soil borings to identify soil types and to establish depth to shallowest fresh water and direction of groundwater flow. The Commission disagrees with this comment because where reasonably possible, the rules should leave to the operator the discretion as to how to fulfill information requirements. The rules should be flexible enough to accommodate several potential methods of accomplishing established performance goals.

In §4.207(b), one commenter suggested that the Commission insert the phrase "for a stationary commercial recycling facility" between the words "application" and "also," because the requirements listed in the remainder of this subsection appear to apply only to stationary recycling, inasmuch as mobile recycling will be performed at many different sites and the potential for environmental damage at any one of them does not seem to warrant the expense of conforming to the requirements for extensive geological and geographical information reasonably required for a stationary site. The Commission agrees and, based on this comment, reviewed the entire proposed rule with a view toward making clear which provisions would apply to stationary facilities, which would apply to mobile facilities, and which would apply to both. Mobile commercial recycling operations differ greatly from stationary commercial recycling operations. A mobile commercial recycling operation moves from lease to lease, processes a

limited volume of waste from one generator and generally one lease, for a limited period of time. A stationary commercial recycling facility is permitted to accept large volumes of waste from a wide variety of oil and gas leases and operators. The application requirements and permitting standards for each type of recycling operation reflect these differences.

Mobile recycling operations generally will occur in conjunction with well or lease operations on an oil or gas lease. The oil and gas operator (generator) is the entity that has an agreement that establishes his or her right to conduct business on the lease. Unlike the operator of a stationary commercial recycling facility, a mobile commercial recycler generally does not have the authority to control access to the oil and gas operator's lease.

The volumes of waste to be treated and recycled at a stationary commercial recycling facility will be much greater than the volumes treated at individual sites by a mobile commercial recycler. The relationship of the mobile commercial recycling facility permittee to the oil and gas operator is akin to that of a third party contractor, such as a well service contractor. The oil and gas operator is responsible for waste management activity on his/her lease.

Because the Commission intends to limit the volume of waste that a mobile commercial recycling facility permittee may treat and recycle at any individual site, and because the operator of the lease is responsible for waste management activities--including those performed by a third party contractor--on that lease, financial assurance over and above that of the lease operator should not be necessary. The Commission generally holds the lease operator responsible for any activity that occurs on the lease, including management of oil and gas waste at the lease, although it has the authority to hold both the generator and the mobile recycler responsible for mismanagement of oil and gas waste. Limitations on mobile commercial recycling that the Commission will impose through the rules and permits also act to limit the environmental and financial risk of such operations.

Unlike a stationary commercial recycling facility, the nature of a mobile commercial recycling operation is such that site-specific information will not be as readily available when preparing a permit application and during review of the application by the Commission. Because mobile commercial recycling generally will be performed on an oil and gas lease, the applicant has much less flexibility than does the applicant for a stationary commercial recycling facility permit to select the most ideal site conditions. The Commission, however, intends to continue to incorporate into the permits for mobile commercial recycling facilities conditions that address general siting concerns. Current Commission permits for mobile recycling of drilling mud and cuttings provide that storage cells at the drill sites and receiving sites may not be within a 100 year floodplain, in a streambed, or in a sensitive area. The Commission will continue to include in mobile commercial recycling facility permits conditions that will ensure that the permitted activities will be protective of human health and the environment and public safety.

The rules and the permit for a mobile commercial recycling operation will limit the volume of waste. Mobile recycling operations will occur in conjunction with exploration and production operations at a well site or on a lease. The Commission has therefore determined that, the potential for environmental damage at any one site justifies not imposing on mobile commercial recyclers the requirements for extensive geological and geographical information required for a stationary facility. In addition, real property information more appropriately applies to stationary commercial recycling facilities because , the stationary recyclers own the property or have an agreement to use the property. A mobile commercial recycler may not know the location of the recycling jobs during the application preparation and processing time period, and is operating pursuant to the authority in the oil and gas operator's lease.

Based on these differences, the Commission reviewed the entire proposed subchapter with a view toward making clear which provisions would apply to mobile commercial recycling facilities, those that apply to stationary commercial recycling facilities, and those that apply to both types of commercial recycling facilities. If a provision does not state whether it applies to mobile or stationary facilities, then it applies to both.

One commenter recommended that subsections §4.207(b)(4) and (5) apply to mobile recycling facilities. Another commenter recommended that the Commission clarify that §4.207 applies to both mobile and stationary facilities. The Commission partially agrees with the second comment. The Commission intended the specific requirements with respect to siting information to apply only to stationary commercial recycling facilities.

One commenter recommended that the Commission clarify that §4.208, relating to Minimum Real Property Information, applies to both mobile and stationary facilities. The Commission declines to make the recommended change. The Commission intends §4.208 to apply to only stationary commercial recycling facilities. The real property information requested in this section most appropriately applies to stationary commercial recycling facilities, the operators of which have an agreement to use the property. The mobile commercial recycling permittee will, by definition, move from one lease to another and, most likely, will not know at the time of preparation of the permit application on which lease(s) the permittee will locate.

One commenter suggested that the phrase "for Stationary Commercial Recycling" be added at the end of the title of §4.209, Minimum Design and Construction Information. Another commenter recommended that paragraphs §4.209(b)(1), (2), (3), and (5) apply to mobile facilities as well since an entity operating a mobile facility should provide this same type of design and construction information as stationary facilities. The Commission agrees with this comment and has clarified requirements that apply to mobile commercial recycling facilities, stationary commercial recycling facilities, and both types of facilities.

Another commenter agreed that §4.210, relating to Minimum Operating Information, should apply to both mobile and stationary facilities. The Commission generally agrees with the commenter, with the exception of the information required with respect to controlling unauthorized access. The mobile commercial recycling facility operator generally does not have the authority to control access to another operator's oil and gas lease. The Commission has clarified this with wording added in the first sentence of §4.210, as well as in paragraph (3).

One commenter recommended that the Commission specify in §4.210 the procedures it requires to control unauthorized access to the facility and to control materials received at the facility. The Commission disagrees with this comment. There are several reasonable and effective mechanisms an operator may employ to control access to a facility and assure that the facility receives only the type of waste it is permitted to receive. Through these rules, the Commission has set a performance standard and will allow an operator the discretion to decide how it will meet the standard, based on the peculiarities of the particular operation.

One commenter expressed concern that, as proposed, paragraphs (6) and (7) of §4.210 could be interpreted as requiring an applicant to disclose a very detailed description of the recycling process and all chemicals, additives, and inert material used in that process. This commenter expressed concern that the current language could force public disclosure of confidential, trade secret information, although the term "general description " in paragraph (6) implies that the Commission recognizes this concern. The commenter suggested that the Commission allow information submitted to satisfy proposed §4.210(6) and (7) to be submitted under a "CONFIDENTIAL" stamp so as to help facilitate the applicant's efforts to protect privileged commercial information or trade secrets in response to a competitor's Public Information Act Request.

The Commission did not intend that an applicant for a commercial recycling facility permit be required to submit proprietary information. Nevertheless, the Commission must have sufficient information in any such application to be able to determine whether or not the processing and use are recycling, and whether or not the proposed facility would pose a threat to human health or the environment. However, the Commission can foresee cases in which applications include information the applicant asserts is proprietary. The Public Information Act, in Texas Government Code, §552.110, exempts trade secret and protected commercial or financial information from public disclosure; and in Texas Government Code, §552.305, establishes a process governmental bodies are required to follow when requested information involves a third party's property interests. The Commission already processes public information requests in accordance with the requirements of the Public Information Act to ensure that trade secret and protected commercial or financial information is properly identified and withheld from public disclosure.

One commenter expressed concern that proposed rule §4.210 did not use language such as "physical or chemical change" to describe what must happen for an oil and gas waste to become a recyclable product. The Commission disagrees that this is the only language capable of attaining the desired result, but has added new paragraph (8) to §4.210 as adopted, to require an applicant for a mobile or stationary recycling facility to describe any testing to be performed to demonstrate that the proposed processing will result in a recyclable product that meets the engineering and environmental standards for the proposed use.

One commenter suggested that the phrase "for Stationary Commercial Recycling" be added at the end of the title of §4.211, Minimum Monitoring Information. Two other commenters recommended that §4.211(1), which relates to providing a sampling plan for partially treated waste to ensure compliance with permit conditions, should apply to mobile and stationary facilities.

The Commission has revised the language in §4.211 to clarify that an applicant for either a mobile or stationary commercial recycling facility must submit a sampling plan. However, the Commission declines to revise the title of the rule in response to the first comment.

One commenter suggested that the phrase "for Stationary Commercial Recycling" be added at the end of the title of §4.212, relating to Minimum Closure Information. Two other commenters recommended that the Commission clarify that §4.212 applies to both mobile and stationary facilities. The Commission declines to revise the title of the rule in response to the first comment and disagrees that the section in its entirety should apply to both mobile and stationary commercial recycling facilities. The requirement to include information relating to soil and groundwater sampling and analysis, plugging of monitoring wells, and reseeding disturbed areas is not warranted for a mobile commercial recycling facility. However, the Commission has revised the language to clarify which of the requirements in this section apply to a permit application for a mobile commercial recycling facility and which apply to an application for a stationary commercial recycling facility.

Two commenters recommended that professional certification be required for the preparation of all closure plans and closure cost estimates to provide the Commission with certainty that these documents will be prepared based on generally acceptable practices. The Commission agrees with this comment; however, §4.206, relating to Minimum Engineering and Geologic Information, already provides that engineering and geologic work products prepared by the applicant shall be sealed required by the Texas Occupation Code. In addition, §3.78, relating to Fees and Financial Security Requirements, already requires that the written estimate of the maximum cost to close the facility consistent with the permit and the laws and rules of the state be prepared by an engineer licensed by the State of Texas.

One commenter recommended that the Commission revise proposed §4.212 to mention closure cost renewal, due dates for closure cost renewals, and who would be required to prepare them. The Commission disagrees that these provisions should be added to the rules in Chapter 4, Subchapter B, because the requirements are already addressed in §3.78, related to Fees and Financial Security Requirements. Also, closure cost renewals depend on the type of closure cost protection filed by the operator.

One commenter suggested that the phrase "for Stationary Commercial Recycling" be added at the end of the title of §4.213, relating to Notice. The Commission agrees that §4.213 applies only to stationary commercial recycling facilities but declines to make the suggested change because the relevant provisions appear in the rule rather than the title.

One commenter recommended that the Commission clarify that §4.213 applies to both mobile and stationary facilities. The Commission disagrees with this comment because §4.213 incorporates the Commission's current requirements for providing published and personal notice of an application for a commercial recycling facility. An applicant for a permit for a stationary commercial recycling facility is required to publish notice of the application in a newspaper of general circulation in the county in which the proposed facility will be located at least once a week for two consecutive weeks, and is required to give personal notice to the surface owner of the tract upon which the facility will be located; surface owners of tracts within a minimum of one-half mile of the outermost boundary of the proposed facility; the city clerk, if the tract is within the corporate limits of an incorporated city, town, or village; and any other person or class of persons that the director determines should receive notice of a particular application. Such requirements are not reasonable for an application for a mobile commercial recycling permit because the mobile operation will occur in conjunction with a lessee or operator, generally on an oil or gas lease, with an established right to conduct business on the property. Also, the limited volume and time involved with a mobile operation are expected to reduce the potential risk. However, the Commission has incorporated into §4.217, relating to General Permit Provisions, its current requirement that a mobile commercial recycling facility permittee notify

the surface owner of the tract upon which his operations will take place.

Two commenters recommended that the Commission subject mobile facilities to the same financial security requirement as required for stationary facilities, since mobile facilities have the same potential for environmental harm. The Commission declines to adopt this recommendation. The Commission has determined that separate financial assurance for a mobile commercial recycling facility is unnecessary because the permitted activity takes place on the oil and gas operator's lease and is limited to that operator's waste, and the Commission has the authority to hold responsible both the recycling facility permit holder and the operator of the lease. The operator of a mobile commercial recycling facility typically is located on an oil and gas operator's lease, where the Commission generally holds the lease operator responsible for any activity that occurs on the lease, including management of oil and gas waste at the lease.

One commenter suggested that the phrase "for Stationary Commercial Recycling" be added at the end of the title of 4.218. Another commenter recommended that the Commission clarify that §4.218 applies to both mobile and stationary facilities. The Commission declines to revise the title as recommended because the relevant provisions appear in the rules and because some of the provisions in this section apply to mobile commercial recycling facilities. The Commission disagrees that all provisions of this section should apply to mobile as well as stationary commercial recycling facilities. The Commission has, however, clarified which provisions do apply to the two type of commercial recycling facilities.

Two commenters requested that the Commission clarify that proposed §4.218(b) does not apply to commercial facilities permitted prior to the effective date of the rules. One of these commenters also requested a specific exemption to clarify that this provision will not place new limitations on facilities that renew their permits after the effective date of these rules. The Commission declines to make changes in response to these comments, which asked the Commission to assure the public that siting restrictions in the adopted rules will not apply to facilities permitted and in operation before the adoption. Section 4.218(e), as adopted, clearly states that "All siting requirements in this section for a stationary commercial recycling facility refer to conditions at the time the facility is constructed." Also, as indicated below, the Commission has removed the prescriptive requirement that facilities be located at least 500 feet from specified areas, and instead will consider the proximity to such areas as factors in determining whether the location of the facility poses an unacceptable risk to public health and safety and the environment.

One commenter commented that proposed new §4.218(b)(1) - (3), which would prohibit the location of a stationary commercial recycling facility within 500 feet of the nearest water well, coastal natural resource area, or sensitive area, is draconian. However, the preamble to the proposed rules states, "the Commission finds that including a specific distance restriction in this rulemaking *is not necessary* because the Commission will receive enough information in each application to make an informed determination of the potential for unreasonable risk to human health and safety and the environment on a case-by-case basis" (emphasis added). Two commenters also stated that the language in proposed new §4.218(b) conflicts with the language in the preamble to the proposed rules. Two of the commenters agreed with the Commission's comment in the preamble and requested that §4.218(b) be revised accordingly to correct the conflicting language. The third commenter recommended that the Commission merely revise the language of either the rule or the preamble to be consistent.

The Commission generally agrees with these comments. The language in the preamble was the correct language. The Commission has made significant changes to §4.218, relating to Minimum Permit Provisions for Siting. Instead of a prescriptive 500 foot distance requirement between the facility and a water supply, or domestic or irrigation water well, a coastal natural resource or a sensitive area, the adopted rule adds proximity to these features as factors the Commission will consider in determining whether a facility poses an unacceptable threat to public health and safety and the environment. These provisions, along with an added catch-all which will allow the Commission to consider other factors that may be relevant to a particular operation, allow Commission staff to determine on a case-by-case basis whether or not the risk to the environment or threat to public health and safety is acceptable with respect to the location of a commercial recycling facility, while giving notice to the public of what the Commission will consider in making this determination.

One commenter opposed the proposed language in §4.218(b), relating to siting of a commercial recycling facility, because the proposed language removes any Commission discretion in determining whether a recycling facility located within the prohibited area would in fact operate in a manner that is protective of human health and the environment and could have a dramatic impact on oil and gas waste facilities located along the Texas coast. The commenter recommended that the Commission revise §4.218(b) so that oil and gas waste recycling facilities are subject to the same siting requirements imposed upon other oil and gas waste management facilities under §3.8 of this title, relating to Water Protection. Further, the commenter recommended that the Commission exempt from the siting prohibitions any on-site or nearby wells used or owned by the recycling facility operator as part of the operation.

The Commission agrees that it should have additional discretion with respect to siting of recycling facilities; however, the Commission does not agree that all commercial recycling facilities should be subject to the same requirements and restrictions as a commercial disposal facility. New §4.218(b) (subsection (c) in the proposed rules) clearly states that the prohibition does not apply to commercial recycling facilities that were permitted prior to the effective date of these rules. Furthermore, the Commission has revised the siting criteria to allow the Commission more discretion in determining siting requirements.

One recycler commented that the rulemaking petition that initiated this process concerned processing oil and gas waste into a road base product and indicated that siting restrictions and applicable parameter limitations and testing protocols in the proposed rules address the production of road base exclusively. This commenter recommended that the Commission revise the new rules to distinguish between requirements applicable to recycling oil and gas wastes into road base products and requirements applicable to recycling oil and gas wastes into other materials. The Commission generally agrees with this comment. While the primary focus of the rulemaking petition was road base, the language in the petition was broad enough to cover recycling for other purposes. The Commission has drafted the rules to cover a wide variety of commercial recycling facilities and practices, while including some specifics that apply to recyclable product to be used as road base.

Two commenters recommended that all commercial facilities be required to provide an actual survey of the facility rather than a scaled drawing, which would allow the Commission to verify that modifications have been made if berms are moved or other alterations are made to the design during the operational life of the facility. The Commission disagrees with, and made no change in response to, this comment. The Commission has determined that a survey would not be substantially more beneficial than a properly executed scale drawing, particularly when the cost of a survey is considered.

One commenter said that even with the limitations included in the definition of "mobile recycling facilities," a mobile facility with multiple renewals could in effect become a stationary facility without the controls required of stationary facilities, and asked the Commission to limit the number of renewals for mobile recycling facilities. The Commission declines to make this suggested change, but has changed the definition of "mobile commercial recycling" to clarify that the Commission does not intend to allow a mobile facility with multiple renewals in effect to become a stationary facility.

One commenter recommended that the Commission clarify which requirements apply to mobile facilities only, which apply to stationary facilities only, and which apply to both types of facilities. Another commenter expressed concern that the proposed rules treat mobile recycling facilities outside of the proposed regulatory scheme for oil and gas waste recycling facilities. The commenter recommended that the Commission treat mobile facilities exactly the same as stationary facilities are to be treated under the rules. This commenter referenced a recent permit issued by the Commission for a mobile recycling process. This commenter stated that the permit limits the amount of time the recyclable product may remain at one location, but also noted that the permit does not limit the amount of waste that can be processed at the site, other than a stated limit of waste from "no more than five wells." This commenter stated that such a limit ignores the reality that even one well can produce a vast amount of oil and gas waste. In addition, this commenter stated that the permit limits the operator to operations within the area of three Commission districts and to a term of five years.

The Commission disagrees that mobile facilities should be treated exactly the same as are stationary facilities because the characteristics of a facility that moves from lease to lease processing waste from one lease operator for a limited period of time are different from those of a facility in one location that is permitted to receive large volumes of waste from a wide variety of oil and gas leases and operators. The Commission has clarified which requirements apply to mobile commercial recycling facilities, and which apply to stationary commercial recycling facilities or to both types of facilities.

One commenter suggested that the phrase "for Stationary Commercial Recycling" be added at the end of the title of §4.219, relating to Minimum Permit Provisions for Design and Construction. Two other commenters recommended that the Commission revise §4.219(e) to require that both mobile and stationary recycling facilities provide notice to the District Office of construction and intended operation. In response to the first comment, the Commission declines to revise the title because the relevant provisions appear in the rule, not the title. In response to the second comment, the Commission agrees and has revised the language in §4.217, relating to General Permit Provisions, to state that a permit for a mobile commercial recycling facility shall include a condition requiring the permittee to notify the appropriate Commission district office before recycling operations commence on each tract.

One commenter recommended that the Commission clarify that §4.219(b) applies to both mobile and stationary facilities. The Commission does not agree with this comment and has made no change. Because of the nature of a mobile recycling operation, the Commission has determined that monitor wells generally will not be necessary because mobile recycling operations will be located at one site for a limited amount of time and for the processing of a limited amount of oil and gas waste as compared to a stationary commercial recycling facility.

Two commenters recommended that the Commission require all currently operating recycling facilities to implement operational requirements such as installation and sampling of groundwater monitor wells and construction of 25-year/24-hour rainfall event capacity detention ponds within a specific and short period of time after the new rules are adopted. The Commission disagrees with these comments because all currently permitted operators are required to abide by the Commission's "no pollution" standard of §3.8 of this title, relating to Water Protection, and the Commission prefers to impose such new requirements at the time of permit renewal.

One commenter said that the requirement for a soil boring log in proposed §4.219 should include a deadline by which the permittee must provide the log to the Commission. The Commission agrees and, in response, adds a new subsection (f), which states that a permit for a commercial recycling facility that requires the installation of monitoring wells shall require that the permittee comply with the requirements for soil borings and provide soil boring logs to the Commission prior to commencing recycling operations.

Two commenters recommended that the Commission revise §4.220 to require a trial run for all recycling operations to provide the Commission with certainty that material will be properly treated into a recycled product. These commenters also recommended that the Commission require specific information associated with a trial run, including sampling requirements, testing requirements, test methods, and limitations. The Commission disagrees that the rules should require a trial run for all recycling operations, because these rules are intended to be flexible enough to accommodate potential recycling operations that may not require a trial run. Accordingly, §4.220 as adopted provides that the Commission may require a trial run, and that the specific sampling requirements, testing requirements, test methods, and limitations will be established on a permit by permit basis, depending on the types of waste being recycled and the recyclable product(s) the operator intends to manufacture.

One commenter recommended that §4.220 should address the specifics associated with speculative accumulation of recyclable material, and clearly establish the 75 percent rule and how the Commission expects to implement the 75 percent rule. As noted in the preamble to the proposed rules, the Commission will include in any permit issued under this subchapter any conditions, including volume restrictions, it determines to be reasonably necessary to ensure that speculative accumulation of oil and gas waste, partially treated waste, and recyclable product does not occur. The Commission declines to include in the rules a specific volume restriction, but intends to continue its current practice of including in the permits for commercial recycling facilities volume limits that are determined on a case-by-case basis.

One commenter suggested that the phrase "for Stationary Commercial Recycling" be added at the end of the title of §4.221, relating to Minimum Permit Provisions for Monitoring. Another commenter stated that it supported applying the provisions §4.220 and §4.221 to both stationary and mobile facilities. The Commission agrees in part. The Commission disagrees with the comment that the Commission revise the title because the relevant provisions appear in the rule, rather than the title, but agrees, and has revised the language to clarify, that the provisions of §4.221 should apply to both mobile and stationary commercial recycling facility permits.

One commenter recommended that the Commission delete the phrase "other similar uses" from the first sentence of §4.221(d) and replace it with "another use in which the recycled product is used in particulate form, with a surface-to-volume ratio close to that of traditional particulate solid road base material and the product is exposed to outdoor weathering," because the purpose behind these requirements seems to be to avoid unacceptable leaching of the constituents enumerated into soil, thereby possibly contaminating it. Leaching rates are strongly dependent on surface-to-volume ratio of a material, and if the material is not used outdoors, soil contamination is unlikely.

The Commission declines to make the recommended change in the language because the Commission intends that this new subchapter apply to recycling activities that include, but are not limited to, reuse of the recyclable product for the purpose of road base. In addition, the Commission will require the recycler to evaluate the potential for leaching of constituents as appropriate based on the proposed use of the recyclable product.

With respect to §4.221(d), one commenter recommended that the word "minimum" be deleted and the phrase "may not exceed the following limits," be replaced by a phrase such as "must correspond to the values shown in following Figure 16." The Commission agrees in part with the second comment and has replaced the phrase "may not exceed the following limits" with the phrase "must meet the following limits." However, the Commission disagrees with the first comment because the parameters listed in Figure §4.221(d) are the minimum parameters the Commission will require. The Commission may include in a permit requirements for analysis for and limitations on additional parameters of concern on a case-by-case basis.

One commenter recommended that the Commission revise §4.222, related to Minimum Permit Provisions for Closure, to include a basic set of closure criteria, including basic closure procedures, testing parameters, closure limitations, record keeping, and notification requirements that would apply to all commercial recycling facilities. The Commission disagrees with these comments. Section 4.222 fairly puts operators and the public on notice of the types of information that may be required for proper closure while allowing the Commission to establish particular closure requirements based on the specific circumstances of each facility.

One commenter expressed concern that the term "recyclable product" will be diminished unless the rule refers to the TxDOT standards for product identification and testing. Another commenter recommended that the Commission add alternative test methods TxDOT 113, 120, and 121 and definitions for these test methods along with TxDOT 126-E, because the latter is believed to pertain only to materials containing asphalt, while the other suggested test methods are for materials with other binding agents. In the alternative, the commenter recommended that the Commission eliminate the definition now appearing as §4.204(15) and simply refer to the full TxDOT Test Method definitions.

The Commission agrees in part with the comment and has replaced the requirement to determine whether or not a partially treated waste meets the minimum compressive strength using a specific method with language that allows such a showing using a Texas Department of Transportation approved procedure appropriate for testing and evaluating partially treated waste that will be used as road base.

One commenter recommended that the Commission replace the parameters and limitations on the parameters listed in proposed Figure §4.221(d) for recyclable products to be used as road base with the more stringent limitations required in the commenter's existing permit in order to maximize protection of human health and the environment. The permit applicant to which this commenter refers requested that the Commission impose the more stringent limits from metals and benzene in its application for a permit. The rule includes the limits that generally are standard in Commission recycling permits and, in most cases, will be protective of the environment and human health. However, the Commission may impose more stringent standards based on site-specific conditions or at the applicant's request.

One commenter recommended that, in the Figure, the Commission raise the upper pH limit to 12.49 standard units. Another commenter recommended that the upper limit for pH be changed from 12 standard units to 12.5 standard units in order for the lime (or other pozzolan) to achieve its intended engineering purpose as a product ingredient. Two commenters recommended changing the pH limitation either to the technical specifications used by the Texas Commission on Environmental Quality for solidified, stabilized, encapsulated, or otherwise chemically bonded non-hazardous industrial waste or that the upper end of the pH range be changed from 12.00 to 12.75 standard units.

The Commission agrees and has raised the upper limit for pH from 12 to 12.49 standard units because that number represents a technically sound compromise between assuring construction integrity of road base products and environmental protection.

One commenter stated that the Louisiana Department of Natural Resources (LDNR) standards for chlorides, total petroleum hydrocarbon (TPH), and pH are not appropriate for production of road base in Texas at the levels included in the rules. The chloride limit in the proposed rule is 500 mg/l while the limit in §3.8 of this title, relating to Water Protection, is 3000 mg/l. The chloride limit should be consistent. Section §3.8 allows 3000 ppm of total chlorides for land farming of oil and gas wastes, a number that is presumably protective of the environment. A limit of 500 ppm chlorides would be difficult to achieve and may result in making recycling cost prohibitive. Using the LDNR Leachate Test Method 1:4 Solid Solution, a limit of 750 ppm chlorides would be more appropriate and consistent with existing agency rules. The "salting" of roads for de-icing and the use of high concentrations of magnesium chlorides and calcium chlorides as a road dust palliative is commonplace. These are considered "traditional materials" by the Texas Department of Transportation and virtually every other state. These applications are in the upper limits of hundreds of thousands of parts per million in relatively pure form, not in water-based solution. Two commenters recommended that the Commission include in proposed Figure §4.221(d) sampling frequency limitations and modify constituent limitations for chlorides from 500 mg/L to 700 milligrams per liter in the adopted rule.

The Commission agrees in part with these comments. The chloride concentration limit of 3000 mg/l in §3.8 specifically applies to landfarming of water base drilling fluid. The limit indicated in Figure 4.221(d) is the limit on the chloride concentration of the leachate from the partially processed material. Furthermore, the Commission does not permit use of oil and gas waste to "de-ice " roads. However, the Commission agrees that the limit of 500 mg/l is overly conservative and has increased the limit to 700 mg/l.

One commenter recommended that the Commission change the limitation for total petroleum hydrocarbons (TPH), proposed at less than 100 ppm, to make it consistent with §3.8, which allows 10,000 ppm TPH for land farming, which is presumably protective of the environment. A limit of less than 100 mg/l would be difficult to achieve and may result in making recycling cost prohibitive. Using the LDNR Leachate Test Method 1:4 Solid Solution, a limit of 2500 ppm TPH would be more appropriate and consistent with existing agency rules. The Commission disagrees with this comment, noting that the TPH limit in adopted §4.221 is the limit for the TPH concentration in the leachate, not the actual recyclable material, and, therefore, the 100 ppm limit is appropriate.

One commenter noted that parameters to be analyzed and the limitations on those parameters are for use of recyclable product as road base and recommended that the Commission revise the regulations to provide constituent limitations for other uses of recyclable products.

The Commission declines to make changes in response to this comment. The parameters included in Figure §4.221(d) specifically apply to use of recyclable product as road base and may or may not apply to other uses of recyclable product made from oil and gas wastes. New Subchapter B generally focuses on, and includes more specific parameters for, the use of recyclable products made from oil and gas wastes as road base, because that is the type of commercial recycling facility for which the Commission has received the largest number of permit applications, and because such use was the general focus of the rulemaking petition. As stated in §4.221(d), the Commission will determine on a case-by-case basis the parameters and limitations to be included in permits for other uses of recyclable product made from oil and gas wastes, based on the standard that the recyclable product meets engineering and environmental requirements for the legitimate commercial use to which it is put.

Two commenters recommended that the Commission revise §4.221 to require that all permittees use an independent third party laboratory neither owned nor operated by the permittee to conduct all analysis of final product. Commercial facilities permitted pursuant to the proposed rules should be allowed to collect their own samples on a routine basis because requiring independent sampling is impractical. The Commission agrees with these comments and adopted §4.221(c) requires an operator to use an independent third party laboratory when laboratory testing is required by the permit.

One commenter requested clarification as to whether the Commission intends for the proposed rules to apply to commercial drilling mud operations. The commenter noted that existing mud plants may fall under RRC exemption criteria by strictly manufacturing mud; however, many such drilling mud vendors sell or lease mud to operators, and then retrieve or receive from haulers the used mud back at their facilities. The commercial mud facility will then clean and remix what mud it can salvage for reuse, i.e., recycle the previously used mud. Once drilling mud has been down the hole a number of times, the operator decides if the mud has become insufficiently effective (spent) to recirculate. This commenter encouraged the Commission to regulate facilities that "recycle" or process drilling mud in this fashion. Typically, the Commission does not have the statutory authority to regulate commercial drilling mud manufacturing companies and their facilities, nor does the Commission regulate service companies. The Commission cannot apply its regulations to facilities and operations that are not under its jurisdiction.

One commenter requested that the Commission confirm that facilities initially applying for authorization to construct and operate under the commercial recycling rules and subsequently deciding not to comply with the commercial recycling rules are oil and gas waste disposal facilities subject to regulation under §3.8 of this title, relating to Water Protection.

Generally, the Commission regulates the management of oil and gas waste under §3.8. Section 4.201, relating to Purpose, clearly states that the provisions of Subchapter B do not supersede other Commission regulations relating to oil field fluids or oil and gas waste, and that no person conducting activities subject to Subchapter B may cause or allow pollution of surface or subsurface water in the state. If an operator receives from the Commission a permit for a commercial recycling facility under this subchapter, and does not comply with the subchapter and the permit, the Commission may use all tools available to it, including enforcement against that operator for violation of the permit, Subchapter B regulations, and any pertinent portion of §3.8.

TxOGA commented that it remains concerned that there may still be a question about liability that might arise from unforeseen impacts after the recycled product is in use. For instance, if materials that are recycled into a road base material are beneficially used for that purpose and are subsequently removed and disposed of as a "waste," TxOGA speculated that potential liability for the waste could carry back to the oil and gas waste generator supplying the material used to make the recycled product. TxOGA recommended that the oil and gas waste generator furnishing oil and gas wastes for commercial recycling be released from liability once those oil and gas wastes have been recycled in accordance with Commission regulations and they are no longer "wastes," so that should they again become "wastes" at some time in the future the original generators would not be held responsible. TxOGA suggested that the statutory authority for such release of liability from Commission prosecution should be the same as that for "No Further Action" letters that the Commission issues for operator cleanups of oil and gas contamination.

The original petition for rulemaking requested that the rules include a statement that any generator whose wastes are turned into a road base product that meets the regulatory standards and is put to a legitimate commercial use be released from liability, noting that such a statement would encourage generators to try to recycle their waste materials. One commenter stated that it did not believe such a provision would in any way violate Texas law or the Texas Constitution, but simply would be a statement of intent by the Commission that the Commission does not intend to prosecute those persons who have properly recycled these wastes into road base.

Yet another commenter commented that once the recyclable product to be used as road base meets the Commission's parameters and applicable industry standards, the material is no longer oil and gas waste and is therefore no longer subject to the Commission's jurisdiction. At that point, "cradle to grave" liability no longer attaches and the oil and gas waste generator

would not be subject to enforcement by the Commission for any misuse or negligent act by the recycling operator or end user regarding the recyclable product.

The Commission agrees that recyclable product put to a legitimate commercial use as authorized in a permit issued under this subchapter is not a waste, but declines to add the suggested language specific to oil and gas waste that is recycled at a commercial recycling facility. Other Commission rules and permits authorize recycling. For example, §3.8 authorizes the use of used drilling fluid from one well to "spud" another well.

The Commission historically holds liable for remediation any entity determined to be responsible for any contamination as a result of any type of waste management, including improper "recycling," that results in contamination. If a generator of an oil and gas waste takes that waste to a commercial recycling facility and knows or should have known that the oil and gas waste would be improperly treated/processed and/or disposed of, rather than recycled, then the Commission reserves the option of enforcing against all parties if the result were pollution. In addition, the process established by this subchapter is intended to result in oil and gas waste becoming a legitimate commercial product. So long as generators, haulers, and recyclers adhere to the provisions of this subchapter, generators should be confident that potential liability for waste taken to a Commission recycling facility is, in fact, significantly minimized.

In addition, the Commission notes that there are only two sections in the Commission's enabling statutes that specifically speak to a release from liability. Texas Natural Resources Code, §81.056(e), relates to a release of liability for contamination or cleanup of contamination reported by a common carrier or pipeline owner or operator, but not caused by that common carrier or pipeline owner or operator, and §91.660, relates to persons released from liability under the Commission's Voluntary Cleanup Program. Absent specific statutory delegation, the Commission does not have the authority to make the requested declarations concerning release of liability in a rule.

Furthermore, the "No Further Action" letters issued by the Commission's Site Remediation section apply to site remediation issues, which are completely different from the waste management issues that are the subject of this subchapter. In response to one of the comments, the Commission clarifies that the "No Further Action" letters, issued by the Site Remediation section for activities other than those under the Voluntary Cleanup Program, do not release an operator from liability should there be discovered additional contaminants which were not addressed in the action for which the Commission issued the "No Further Action" letter.

The Commission adopts new Subchapter B under Texas Water Code, §26.131, and Texas Natural Resources Code, §§91.101, 91.1011, and 91.109, which declare that the Commission is solely responsible for the prevention and abatement of water and subsurface water pollution attributable to activities the Commission regulates, and that the Commission may adopt rules related to the discharge, storage, handling, transportation, processing, or disposal of oil and gas waste, or of any other substance or material associated with operations or activities regulated by the Commission pursuant to Texas Natural Resources Code, §91.101(a)(1), (2), and (3). In addition, Texas Natural Resources Code, §91.109(a), provides that the Commission may require a bond or other form of financial security from person applying for or acting under a Commission permit to store, handle or treat oil and gas waste.

The partially treated waste and recyclable product resulting from processing and/or treatment of oil and gas waste pursuant to a Commission permit constitutes a "substance or material associated with any operation or activity regulated by the by the Commission" under Texas Natural Resources Code, §91.101(a)(1), (2), and (3). The recyclable product is associated with operation or activity regulated by the Commission because it was created using oil and gas waste over which the Commission has exclusive jurisdiction, and which the Commission no longer considers to be an oil and gas waste if the recyclable product will be used as intended pursuant to permit conditions.

Texas Water Code, §26.131, and Texas Natural Resources Code, §§91.101, 91.1011, and 91.109, are affected by the adopted rules.

Statutory authority: Texas Water Code, §26.131, and Texas Natural Resources Code, §§91.101, 91.1011, and 91.109.

Cross-reference to statutes: Texas Water Code, §26.131, and Texas Natural Resources Code, §§91.101, 91.1011, and 91.109.

Issued in Austin, Texas, on November 14, 2006.

§4.202. Applicability and Exclusions.

(a) The provisions of this subchapter apply to mobile and stationary commercial recycling facilities.

(b) The provisions of this subchapter do not apply to recycling methods authorized for certain wastes by §3.8 of this title, relating to Water Protection; §3.57 of this title, relating to Reclaiming Tank Bottoms, Other Hydrocarbon Wastes, and Other Waste Materials; or §3.98 of this title, relating to Standards for Management of Hazardous Oil and Gas Waste.

(c) The provisions of this subchapter do not apply to recycling facilities regulated by the Texas Commission on Environmental Quality or its predecessor or successor agencies, another state, or the federal government.

§4.204. Definitions.

Unless a word or term is defined differently in this section, the definitions in §3.8 of this title, relating to Water Protection, §3.98 of this title, relating to Standards for Management of Hazardous Oil and Gas Waste, and §4.603 of this chapter, relating to Oil and gas NORM, shall apply in this subchapter. In addition, the following words and terms when used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise:

(1) 100-year flood plain--An area that is inundated by a 100-year flood, which is a flood that has a one percent or greater chance of occurring in any given year.

(2) Adjoining--Every tract of property surrounding the tract of property upon which the activity sought to be permitted will occur, including those tracts that meet only at a corner point.

(3) Commercial recycling facility--A mobile or stationary facility whose owner or operator receives compensation from others for the storage, handling, treatment, and recycling of oil and gas wastes and primary business purpose of the facility is to provide these services for compensation, whether from the generator of the waste, another receiver, or the purchaser of the recyclable product produced at the facility.

(4) Commission--The Railroad Commission of Texas.

(5) Director--The director of the Commission's Oil and Gas Division or the director's delegate.

(6) EPA Method 1312, Synthetic Precipitation Leaching Procedure (SPLP)--An analytical method used to evaluate the potential for leaching of metals and/or benzene into surface and subsurface water.

(7) Legitimate commercial use--Use or reuse of a recyclable product as defined in a permit issued pursuant to this subchapter:

(A) as an effective substitute for a commercial product or as an ingredient to make a commercial product; or

(B) as a replacement for a product or material that otherwise would have been purchased; and

(C) in a manner that does not constitute disposal.

(8) Louisiana Department of Natural Resources Leachate Test Method--An analytical method designed to simulate water leach effects on treated oil and gas wastes included in "Laboratory Manual for the Analysis of E&P Waste," Louisiana Department of Natural Resources, May 2005.

(9) Mobile commercial recycling--Commercial recycling performed on a lease or well site using equipment that moves from one location to another and restricted in the:

(A) amount of time operations occur at any one location;

(B) volume and source of waste that may be processed at any one location; and

(C) size of the area used for recycling.

(10) Oil and gas wastes--For purposes of this subchapter, this term means materials which have been generated in connection with activities associated with the exploration, development, and production of oil or gas or geothermal resources, as that term is defined in §3.8 of this title, relating to Water Protection, and materials which have been generated in connection with activities associated with the solution mining of brine. The term "oil and gas wastes" includes, but is not limited to, saltwater, other mineralized water, sludge, spent drilling fluids, cuttings, waste oil, spent completion fluids, and other liquid, semiliquid, or solid waste material. The term "oil and gas wastes" includes waste generated in connection with activities associated with gasoline plants, natural gas or natural gas liquids processing plants, pressure maintenance plants, or repressurizing plants unless that waste is a hazardous waste as defined by the administrator of the United States Environmental Protection Agency pursuant to the federal Solid Waste Disposal Act, as amended (42 United States Code §6901 et seq.).

(11) Partially treated waste--Oil and gas waste that has been treated or processed with the intent of being recycled, but which has not been determined to meet the environmental and engineering standards for a recyclable product established by the Commission in this subchapter or in a permit issued pursuant to this subchapter.

(12) Recyclable product--A reusable material that has been created from the treatment and/or processing of oil and gas waste as authorized by a Commission permit and that meets the environmental and engineering standards established by the permit for the intended use, and is used as a legitimate commercial product. A recyclable product is not a waste, but may become a waste if it is abandoned or disposed of rather than recycled as authorized by the permit.

(13) Recycle--To store, handle, and/or treat oil and gas wastes for use or reuse as, or for processing into, a product for which there is a legitimate commercial use.

(14) Stationary commercial recycling facility--A commercial recycling facility in an immobile, fixed location.

§4.205. General Permit Application Requirements for Commercial Recycling Facilities.

(a) An application for a permit for a mobile or stationary commercial recycling facility shall be filed with the Commission's headquarters office in Austin. The applicant shall mail or deliver a copy of the application to the Commission District Office for the county in which the facility is to be located on the same day the original application is mailed or delivered to the Commission's headquarters office in Austin. A permit application shall be considered filed with the Commission on the date it is received by the Commission's headquarters office in Austin.

(b) The permit application shall contain the applicant's name; organizational report number; physical office and, if different, mailing address; facility address; telephone number; and facsimile transmission (fax) number; and the name of a contact person. A permit for a stationary commercial recycling facility also shall contain the facility address.

(c) The permit application shall contain information addressing each application requirement of this subchapter and all information necessary to initiate the final review by the director. The director shall neither administratively approve an application nor refer an application to hearing unless the director has determined that the application is administratively complete. If the director determines that an application is incomplete, the director shall notify the applicant in writing and shall describe the specific information required to complete the application. An applicant may make no more than two supplemental filings to complete an application.

(d) The permit application shall contain an original signature in ink, the date of signing, and the following certification: "I certify that I am authorized to make this application, that this application was prepared by me or under my supervision and direction, and that the data and facts stated herein are true, correct, and complete to the best of my knowledge."

§4.206. Minimum Engineering and Geologic Information.

(a) The director may require a permit applicant for a mobile or stationary commercial recycling facility to provide the Commission with engineering, geological, or other information which the director deems necessary to show that issuance of the permit will not result in the waste of oil, gas, or geothermal resources, the pollution of surface or subsurface water, or a threat to the public health or safety.

(b) Engineering and geologic work products prepared by the applicant shall be sealed by a registered engineer or geologist, respectively, as required by the Texas Occupations Code, Chapters 1001 and 1002.

§4.207. Minimum Siting Information.

A permit application for a stationary commercial recycling facility shall include:

(1) a description of the proposed facility site and surrounding area; and

(2) the name, physical address and, if different, mailing address; telephone number; and facsimile transmission (fax) number of every owner of the tract on which the facility is to be located. If any owner is not an individual, the applicant shall include the name of a contact person for that owner.

(3) the depth to the shallowest fresh water and the direction of groundwater flow at the proposed site, and the source of this information;

(4) the average annual precipitation and evaporation at the proposed site and the source of this information;

(5) the identification of the soil and subsoil by typical name and description of the approximate proportion of grain sizes, texture, consistency, moisture condition, and other pertinent characteristics, and the source of this information;

(6) a copy of a county highway map with a scale and north arrow showing the location of the proposed facility; and

(7) a complete, original 7 1/2 minute United States Geological Survey topographic quadrangle map clearly indicating the outline of the proposed facility; the location of any pipelines that underlay the facility but are not included on the topographic map; and the location of the 100-year flood plain and the source of the flood plain information.

§4.209. Minimum Design and Construction Information.

(a) A permit application for a mobile or stationary commercial recycling facility shall include the layout and design of the facility by including a plat drawn to scale with north arrow to top of map showing the location and information on the design and size of all receiving, processing, and storage areas and all equipment (e.g., pug mill), tanks, silos, monitor wells, dikes, and access roads.

(b) A permit application for a mobile or stationary commercial recycling facility also shall include:

(1) a description of the type and thickness of liners (e.g., fiberglass, steel concrete), if any, for all tanks, silos, and storage areas/cells;

(2) for storage areas where tanks and/or liners are not used, credible engineering and/or geologic information demonstrating that tanks or liners are not necessary for the protection of surface and subsurface water;

(3) a map view and two perpendicular cross-sectional views of storage areas/cells to be constructed, showing the bottom, sides, and dikes, showing the dimensions of each;

(4) a plan to control and manage storm water runoff and to retain incoming wastes during wet weather, including the location and dimensions of dikes and/or storage basins that would collect storm water from the facility during a 25-year, 24-hour maximum rainfall event, and all calculations made to determine the required capacity and design; and

(5) if the application is for a stationary commercial recycling facility, a plan for the installation of monitoring wells at the facility.

§4.210. Minimum Operating Information.

A permit application for a mobile or stationary commercial recycling facility shall include the following operating information:

(1) the estimated maximum volume of untreated oil and gas waste and partially treated oil and gas waste to be stored at the facility;

(2) the estimated maximum volume and time that the recyclable product will be stored at the facility;

(3) a plan to control unauthorized access to the facility, if the application is for a stationary commercial recycling facility;

(4) a detailed waste acceptance plan that:

(A) identifies anticipated volumes and specific types of wastes (e.g., oil-based drilling fluid and cuttings, crude oil-contaminated soils, production tank bottoms, etc.) to be accepted at the facility for treatment and recycling; and

(B) provides for testing of wastes to be processed to ensure that only oil and gas waste authorized by this subchapter or the permit will be received at the facility;

(5) plans for keeping records of the source and volume of wastes accepted for recycling in accordance with the permit, including maintenance of records of the source of waste received by well number, API number, lease or facility name, lease number and/or gas identification number, county, and Commission district;

(6) a general description of the recycling process to be employed; a flow diagram showing the process and identifying all equipment and chemicals or additives (e.g., asphalt emulsion, quicklime, Portland cement, fly ash, etc.) to be used in the process; and the Material Safety Data Sheets for any chemical or additive;

(7) a description of all inert material (e.g., brick, rock, gravel, caliche) to be stored at the facility and used as aggregate in the treatment process;

(8) a description of any testing to be performed to demonstrate that the proposed processing will result in a recyclable product that meets the engineering and environmental standards for the proposed use; and

(9) an estimate of the duration of operation of the proposed facility.

§4.211. Minimum Monitoring Information.

A permit application for a mobile or stationary commercial recycling facility shall include:

(1) a sampling plan for the partially treated waste to ensure compliance with permit conditions;

(2) a plan for sampling any monitoring wells at a stationary commercial recycling facility as required by the permit and this subchapter; and

(3) a plan and schedule for conducting periodic inspections, including plans to inspect equipment, processing, and storage areas.

§4.212. Minimum Closure Information.

(a) A permit application for a mobile or stationary commercial recycling facility shall include a detailed plan for closure of the facility when operations terminate. The closure plan shall address how the applicant intends to:

(1) remove waste, partially treated waste, and/or recyclable product from the facility;

(2) close all storage areas/cells; and

(3) remove dikes.

(b) A permit application for a stationary commercial recycling facility also shall include in the closure plan information addressing how the applicant intends to:

(1) sample and analyze soil and groundwater throughout the facility;

(2) plug groundwater monitoring wells; and

(3) contour and reseed disturbed areas.

§4.214. Administrative Decision on Permit Application.

(a) If the Commission does not receive a protest to an application submitted under this subchapter, the director may administratively approve the application if the application otherwise complies with the requirements of this subchapter.

(b) The director may administratively deny the application if does not meet the requirements of this subchapter or other laws, rules, or orders of the Commission. The director shall provide the applicant written notice of the basis for administrative denial.

(c) The applicant may request a hearing upon receipt of notice of administrative denial. A request for hearing shall be made to the director within 30 days of the date on the notice. If the director receives a request for a hearing, the director shall refer the matter to the Office of General Counsel for assignment of a hearings examiner who shall conduct the hearing in accordance with the Commission's rules of Practice and Procedure, 16 Texas Administrative Code Chapter 1.

§4.216. Standards for Permit Issuance.

A permit issued pursuant to this subchapter may be issued only if the director or the Commission determines that:

(1) the storage, handling, treatment, and/or recycling of oil and gas wastes and other substances and materials will not result in the waste of oil, gas, or geothermal resources, the pollution of surface or subsurface water, a threat to public health and safety; and

(2) the recyclable product can meet engineering and environmental standards the Commission establishes in the permit or in this subchapter for its intended use.

§4.217. General Permit Provisions.

(a) A permit for a mobile or stationary commercial recycling facility issued pursuant to this subchapter shall be issued for a term of not more than five years, subject to renewal, and shall not be transferable to another operator without the written approval of the director.

(b) A permit for a mobile or stationary commercial recycling facility issued pursuant to this subchapter shall provide that the facility may only receive, store, handle, treat, or recycle waste:

(1) under the jurisdiction of the Commission;

(2) that is not a hazardous waste as defined by the administrator of the Environmental Protection Agency pursuant to the federal Solid Waste Disposal Act, as amended (42 United States Code, §6901, et seq.); and

(3) that is not oil and gas naturally occurring radioactive (NORM) waste as defined in §4.603 of this title, relating to Oil and Gas Naturally Occurring Radioactive Waste.

(c) A permit for a stationary commercial recycling facility issued pursuant to this subchapter shall require that, prior to operating, a stationary commercial recycling facility comply with the financial security requirements of Texas Natural Resources Code, §91.109, relating to Financial Security for Persons Involved in Activities Other than Operation of Wells, as implemented by §3.78 of this title, relating to Fees and Financial Security Requirements.

(d) A permit for a mobile or stationary commercial recycling facility shall include a condition requiring that the permittee notify the surface owner of the tract upon which recycling will take place and the appropriate Commission district office before recycling operations commence on each tract.

§4.218. Minimum Permit Provisions for Siting.

(a) A permit for a mobile or stationary commercial recycling facility may be issued only if the director or the Commission determines that the facility is to be located in an area where there is no unreasonable risk of pollution or threat to public health or safety.

(b) A stationary commercial recycling facility permitted pursuant to this subchapter and after the effective date of this subchapter shall not be located within a 100-year flood plain.

(c) Factors that the Commission will consider in assessing potential risk from a mobile or stationary commercial recycling facility include:

(1) the volume and characteristics of the oil and gas waste, partially treated waste and recyclable product to be stored, handled, treated and recycled at the facility;

(2) depth to and quality of the shallowest groundwater;

(3) distance to the nearest property line or public road;

(4) proximity to coastal natural resources, sensitive areas as defined by §3.91 of this title, relating to Cleanup of Soil Contaminated by a Crude Oil Spill, or water supplies, and/or public, domestic, or irrigation water wells; and

(5) any other factors the Commission deems reasonably necessary in determining whether or not issuance of the permit will pose an unreasonable risk.

(d) All siting requirements in this section for a stationary commercial recycling facility refer to conditions at the time the facility is constructed.

§4.219. Minimum Permit Provisions for Design and Construction.

(a) A permit issued pursuant to this subchapter for a mobile or stationary commercial recycling facility shall contain any requirement that the director or the Commission determines to be reasonably necessary to ensure that:

(1) the design and construction of storage areas, containment dikes, and processing areas minimize contact of oil and gas waste and partially recycled waste with the ground surface, and prevent pollution of surface and subsurface water;

(2) the pollution of surface and subsurface water from spills, leachate, and/or discharges from the facility is prevented by:

(A) prohibiting the unauthorized discharge of oil and gas waste and other substances or materials, including contaminated storm water runoff, from the facility to the land surface at and adjacent to the facility or to surface and subsurface water;

(B) requiring that the permittee control spills at the facility; and

(C) requiring that the permittee make regular inspections of the facility; and

(3) the design and construction of the facility allows for monitoring for, and detection of, any migration of oil and gas waste or other substance or material from the facility.

(b) A permit issued for a stationary commercial recycling facility pursuant to this subchapter shall require that the permittee:

(1) install monitoring wells in accordance with 16 Texas Administrative Code, Part 4, Chapter 76, relating to Water Well Drillers and Water Well Pump Installers; and

(2) submit to the Commission's office in Austin a soil boring log and other information for each well.

(c) The soil boring log and other information required in subsection (b) of this section shall:

(1) describe the soils using the Unified Soils Classification System (equivalent to ASTM D 2487 and 2488);

(2) identify the method of drilling, total depth, and the top of the first encountered water or saturated soils;

(3) include a well completion diagram for each monitoring well;

(4) include a survey elevation for each wellhead reference point; and

(5) include a potentiometric map showing static water levels and the direction of groundwater flow.

(d) The Commission or the director may waive any or all of the requirements in subsection (b) and (c) of this section if the permittee demonstrates that an on-site boring to a minimum depth of 100 feet recovers no water during a 24-hour test.

(e) A permit for a stationary commercial recycling facility issued pursuant to this subchapter shall require that the permittee notify the Commission district office for the county in which the facility is located prior to commencement of construction, including construction of any dikes, and again upon completion of construction and that the permittee may commence operations under the permit only after the facility has been inspected by the Commission to ensure that construction of all elements of the facility is consistent with the representations in the application and the requirements of the permit.

(f) A permit for a stationary commercial recycling facility issued pursuant to this subchapter that requires the installation of monitoring wells shall require that the permittee comply with subsections (b) and (c) of this section prior to commencing recycling operations.

§4.220. Minimum Permit Provisions for Operations.

(a) A permit for a mobile or stationary commercial recycling facility issued pursuant to this subchapter shall contain requirements the Commission determines to be reasonably necessary to ensure that:

(1) only wastes and other materials authorized by the permit are received at the facility, including requirements that the permittee test incoming oil and gas waste and keep records of amounts and sources of incoming wastes; and

(2) the processing operation and resulting recyclable product meet the environmental and engineering standards established in the permit.

(b) A permit for a mobile or stationary commercial recycling facility issued under this subchapter may require the permittee to perform a trial run in accordance with the following procedure.

(1) The permittee shall notify the Commission district office for the county in which the facility is located prior to commencement of the trial run.

(2) The permittee shall sample and analyze the partially treated waste that results from the trial run, and submit to the director for review a report of the results of the trial run prior to commencing operations.

(3) The director shall approve the trial run if the report demonstrates that the recyclable product meets or exceeds the environmental and engineering standards established in the permit.

(4) The permittee shall not use the recyclable product until the director approves the trial run report.

(c) A permit for a mobile or stationary commercial recycling facility issued pursuant to this subchapter shall include any requirements, including limits on the volumes of oil and gas waste, partially treated waste, and recyclable product stored at the facility, that the Commission determines to be reasonably necessary to ensure that the permittee does not speculatively accumulate oil and gas waste, partially treated waste, and/or recyclable product at the facility without actually processing the oil and gas waste and putting the recyclable product to legitimate commercial use.

§4.221. Minimum Permit Provisions for Monitoring.

(a) A permit for a mobile or stationary commercial recycling facility issued pursuant to this subchapter shall include requirements the director or Commission determines to be reasonably necessary to ensure that the recyclable product meets the environmental and engineering standards established by the director or the Commission and included in the permit.

(b) Consistent with the requirements of §4.216 of this chapter, relating to Standards for Permit Issuance, the director or the Commission shall establish and include in the permit for a mobile or stationary commercial recycling facility the parameters for which the partially treated waste is to be tested, and the limitations on those parameters based on:

(1) the type of oil and gas waste to be accepted at the commercial recycling facility; and

(2) the intended use for the recyclable product.

(c) A permit for a mobile or stationary commercial recycling facility may require laboratory testing. A permit that requires laboratory testing shall require that the permittee use an independent third party laboratory to analyze a minimum standard volume of partially treated waste for parameters established in this subchapter or in a permit issued by the Commission.

(d) A permit for a mobile or stationary commercial recycling facility issued pursuant to this subchapter from which the recycled product will be used as road base or other similar uses shall include a requirement that the samples of partially treated waste be analyzed for the following minimum parameters and meet the following limits: Figure: 16 TAC §4.221(d)

§4.222. Minimum Permit Provisions for Closure.

A permit for a mobile or stationary commercial recycling facility issued pursuant to this subchapter shall include closure standards and any requirement reasonably necessary to ensure that the permittee can meet the standards. The Commission shall determine the closure standards for a particular facility based on the type of materials stored, handled and treated at the facility, and the design and construction of the facility. A permit may include requirements for removal of all waste, partially treated waste, and recyclable product; removal of dikes, storage, liners, and equipment; recontouring of the land; collection and analyzing of soil and groundwater samples from the facility property; and post-closure monitoring.

§4.224. Exceptions.

An applicant or permittee may request an exception to the provisions of this subchapter by submitting to the director a written request and demonstrating that the requested alternative is at least equivalent in the protection of public health and safety, and the environment, as is the provision of this subchapter to which the exception is requested. The director shall review each written request on a case-by-case basis. If the director denies a request for an exception, the applicant or permittee may request a hearing consistent with the hearing provisions of this subchapter relating to hearings requests but may not use the requested alternative until the Commission approves it.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 5. PROPERTY AND CASUALTY INSURANCE

SUBCHAPTER A. AUTOMOBILE INSURANCE

DIVISION 7. FINANCIAL RESPONSIBILITY VERIFICATION PROGRAM

28 TAC §§5.601 - 5.611

The Commissioner of Insurance adopts new Division 7, §§5.601 - 5.611, concerning the Financial Responsibility Verification Program to verify coverage under the Texas Motor Vehicle Safety Responsibility Act as required by SB 1670, 79th Legislature, Regular Session. Sections 5.602 - 5.611 are adopted with changes to the proposed text published in the September 8, 2006, issue of the *Texas Register* (31 TexReg 7226). Section 5.601 is adopted without change.

The adopted sections detail administrative requirements for insurers to comply with the Financial Responsibility Verification Program (program), including setting forth the types of insurance policy information that the Department, in consultation with the Texas Department of Transportation (TxDOT), the Texas Department of Public Safety (DPS), and the Texas Department of Information Resources (DIR) (the implementing agencies), have determined will be necessary for the vendor to carry out the program and implement the requirement in Transportation Code §601.454(a) that each insurance company providing personal automobile insurance policies in this state must provide the necessary insurance policy information to the vendor. The adopted sections are necessary to specify program requirements, procedures, duties, and obligations for insurers writing personal automobile insurance policies that establish financial responsibility required by the Texas Motor Vehicle Safety Responsibility Act, Transportation Code, Chapter 601. In accordance with SB 1670, the adopted sections are currently limited to insurers providing motor vehicle liability insurance under a personal automobile insurance policy in this state. The program will be implemented for commercial insurance policies in the future when the implementing agencies determine that it is feasible. The commercial program will be implemented through a separate rulemaking process.

SB 1670 enacted by the 79th Legislature, Regular Session, added Subchapter N to Chapter 601 of the Transportation Code. SB 1670 requires the establishment of a program for verification of whether owners of motor vehicles have established financial responsibility as required by the Texas Motor Vehicle Safety Responsibility Act, Transportation Code, Chapter 601. Section 601.452(a) requires the Department, in consultation with the other implementing agencies, to establish the program. The program must meet the specific statutory requirements of §601.452(a), including being most likely to: reduce the number of uninsured motorists in this state; operate reliably; be cost effective; sufficiently protect the privacy of the motor vehicle owners; sufficiently safeguard the security and integrity of information provided by insurance companies; identify and employ a method of compliance that improves public convenience; provide information that is accurate and current; and also be capable of being audited by an independent auditor. Section 601.452(b) provides that the implementing agencies jointly adopt rules to administer the program. Section 601.452(c) requires the implementing agencies to convene a working group to facilitate implementation of the program, assist in the development of rules, and coordinate a testing phase and necessary changes identified in the testing phase. Pursuant to §601.452(c), the working group is statutorily required to be composed of representatives of the implementing agencies, the insurance industry, and technical experts with the skills and knowledge required to create and maintain the program, including knowledge of privacy laws. The working group was first convened in July 2005, before SB 1670 became effective on September 1, 2005. Through subsequent meetings, the Department and the other implementing agencies have worked with the working group to facilitate the implementation of the program and the development of the adopted sections. Adopted §§5.601 - 5.611 are the result of the process of joint consultation and coordination among the implementing agencies culminating with the Department's proposal and adoption of rules necessary for the Department to administer its program responsibilities under Transportation Code, Chapter 601, Subchapter N and §502.1715, including, as required by §601.454, setting forth the insurance policy information the implementing agencies have determined to be necessary for the vendor to carry out the program and the means by which insurers are to submit that insurance policy information to the vendor. The Department will continue to work with the other implementing agencies, the insurance industry, and technical experts to facilitate the implementation of the program and coordinate the testing of the program.

The Department, in consultation with the other implementing agencies, as required under Transportation Code §601.451(a), has established the program. The program contemplates verification of insurance through both an event based process and an ongoing verification process. The event based process allows users to obtain accurate and current insurance verification information promptly upon request. The ongoing verification process allows for the matching of insurer records to TxDOT data to identify uninsured vehicles on a continuous basis. Users of both processes will be checking that insurance is maintained in compliance with the Texas Motor Vehicle Safety Responsibility Act. Users will include TxDOT, law enforcement officers, and inspection stations.

Additionally, as required by Transportation Code §601.453, the Department, in consultation with the other implementing agencies, has initiated a competitive bidding procedure for the purpose of selecting an agent to develop, implement, operate, and maintain the program. The program agent will be contractually required to maintain all data, including the insurer provided policy information required by adopted §§5.601 - 5.611, and operate the system in a manner that will sufficiently protect the privacy

of motor vehicle owners and drivers and safeguard the security and integrity of insurance company information. To avoid confusion with insurance related terms referencing agent, the term vendor is used in this adoption to refer to the §601.453 agent in lieu of the term program agent.

The program allows insurers to select between the database system and web services system as a method of program compliance. The database system requires insurers to weekly submit the required data for use in a vendor maintained database. The vendor will match insurer submitted data to TxDOT data using both direct matching and cascading data matching algorithms that are designed to analyze possible, but not exact, matches and determine if it is more likely than not that a match exists with the insurance policy in question. Unmatched policy records will be reported to the insurer as errors for confirmation or correction of policy information. The vendor will then use the stored submitted matched data to respond to user inquiries. The web services system requires the insurer to develop and maintain the insurer's own matching program. The web services system in adopted §§5.606 - 5.608 remains as described in the proposal and is designed to function within the existing framework of data maintained by TxDOT and DPS equipment, as well as meet DPS concerns regarding law enforcement officer safety. The web services system insurer will develop its own matching algorithm and be responsible for error checking its data against supplied TxDOT records to identify unmatched policy records. The Department will determine if an insurer's web services system meets the requirements set forth in adopted §§5.606 - 5.608. The web services insurer will receive and respond to user requests through the vendor. The type of system selected by the insurer will not affect users or the public because users will be able to access both systems through the vendor using the same request criteria.

The program will meet the legislative requirements set forth in Transportation Code §601.452(a) by being most likely to: (i) reduce the number of uninsured motorists through more thorough enforcement of the Texas Motor Vehicle Safety Responsibility Act by providing an enhanced means of verifying insurance coverage during events such as traffic stops and vehicle inspections, as well as providing for continuous identification of uninsured vehicles through the ongoing verification process; (ii) operate reliably through use of technology and systems that have been shown to operate reliably in existing verification systems established in other states; (iii) be cost effective considering currently available technology, equipment, information databases, and resources of the implementing agencies, users, insurance industry, and insured public; (iv) protect policyholder privacy and insurer data security through the use of contractually required vendor security measures; (v) provide improved convenience to the public by not imposing additional procedures or requirements for compliance on the public and by using cascading data matching to reduce the number of unmatched insurance polices; and (vi) provide available insurer information that is current based on weekly data submissions and can be tested against TxDOT's database for accuracy. Both the database system and web services system allow for the program to be independently audited.

The adopted sections also provide for voluntary participation in a test program that will use insurer provided key-data to provide verification of financial responsibility under the Texas Motor Vehicle Safety Responsibility Act. Numerous comments were received advocating that a test program based on the Insurance Industry Committee on Motor Vehicle Administration (IICMVA) model be adopted in place of the web services system or that the test program be made more prominent in the text of the rule. Commenters also indicated that a system similar to the IICMVA model was undergoing limited testing in Florida and was adopted for future use in Wyoming. However, the commenters did not demonstrate that the IICMVA system was acceptable to all of the implementing agencies as a means of program compliance, as would be required by SB 1670. Moreover, two commenters conceded that the IICMVA model is not ready for implementation in Texas at this time and proposed that the pilot program could assist in preparing the IICMVA model for acceptance in Texas. As such, the adopted web services system in §§5.606 - 5.608 is not the IICMVA web services model and the Department declines to make such an alteration. Adopted §5.611 continues to provide for voluntary participation in a test program that will use insurer provided key-data to provide verification of financial responsibility under the Texas Motor Vehicle Safety Responsibility Act. Adopted §5.611 has been revised to indicate a path by which the test program can be tested and, if accepted by the implementing agencies, approved for use in Texas. Adopted §5.611, however, has not been defined as, or limited to, the existing IICMVA model, so that the adopted provision will allow for potential change and innovation between the participating insurers and implementing agencies. Adopted §5.611 also clarifies that the test program is not limited to §§5.606 - 5.608.

Finally, while the requirements in the adopted sections are limited to personal automobile insurance policies, commercial insurance policy information may be reported at the insurer's option. Optional reporting of commercial insurance policy information must be done in a manner consistent with this adoption.

In addition to the changes to adopted §5.611, the Department has made several other changes to the proposed sections based on comments received by the Department. None of these changes, including the changes to adopted §5.611, introduce new subject matter or affect persons in addition to those subject to the proposal as published. These comments and changes are discussed in the following paragraphs of this section.

The Department received a comment questioning the Department's compliance with the Administrative Procedures Act (APA), Government Code, Chapter 2001. More specifically, the commenter argued that, since the user guide creates requirements that insurers could be sanctioned for violating, the user guide must be adopted separately as a rule or as part of the proposed rule. Additionally, the commenter objected to the proposal because a completed user guide was not available for review at the same time as the proposed rule and, thus, claimed that proper notice of the rule was not given pursuant to the APA. Several other commenters also complained about the lack of a user guide for review and comment before the adoption of the proposal. The Department disagrees with these assertions and argues that they are contrary to the language of SB 1670. Under SB 1670, the Legislature specifically granted rulemaking authority to administer, or carry out, Transportation Code, Chapter 601, Subchapter N, in Transportation Code §§601.452(b) and 502.1715(b). However, while SB 1670 provides clear instruction to adopt rules, it does not state that the user guide is to be adopted by rule or as a rule. Instead, SB 1670, Section 4, provides clear instruction that the agencies responsible for implementing Subchapter N, Chapter 601, Transportation Code, as added by this Act, shall adopt rules and establish and publish a user guide clearly specifying requirements and procedures for providing information under the verification program under that subchapter. As such, the user guide is not a rule, or required to

be part of the rules to be adopted to administer, or to carry out, Transportation Code, Chapter 601, Subchapter N.

Transportation Code §601.452 sets forth the requirement to establish the program. Transportation Code §601.453 describes the program agent (herein called the vendor) and the scope of the vendor's contract. Transportation Code §601.454 requires insurance companies to submit data determined by the implementing agencies as necessary for the vendor to carry out the program. This adoption sets forth the insurance policy information that the implementing agencies have determined will be necessary for the vendor to carry out the program and implements the requirement that the insurer must provide that information to the vendor. The user guide does not create these requirements.

The user guide will contain references to statutes of this state and these adopted sections. However, to that end, the user guide is just a reference tool because the user guide cannot alter the referenced statutes or the adopted sections. What the user guide will do is explain how the information required under this adoption is to be submitted. As such, while the user guide will have general applicability to insurers, it is questionable whether, under Government Code §2001.003(6), that the user guide constitutes a state agency statement that either implements, interprets, or prescribes law or policy; or describes the procedure or practice requirements of a state agency. The Department's interpretation is that, as a document, the user guide does not meet the §2001.003(6) definition of a rule.

As to the question of opportunity to comment on the user guide, the Department disagrees that this is a requirement under SB 1670 or the APA. The user guide is not a rule. It does not create the obligation to submit data to the vendor. Neither the APA nor SB 1670 requires public comment on the user guide. However, although not required, the Department has solicited comments from the public and users on a draft user guide, including publishing notice of a draft user guide for comment in the October 20, 2006, issue of the *Texas Register* (31 TexReg 8766).

In summary, the Legislature identified the rules to be adopted and specifically did not require the user guide to be adopted by reference or as a separate rule. Further, the user guide does not fit within the scope of a rule as defined by Government Code §2001.003. The adopted sections administer the program, including specifying the information that the implementing agencies have determined to be necessary for the vendor to carry out the program and implementing the requirement for the insurers to submit that data to the vendor. The user guide provides guidance for complying with those sections.

While the Department disagrees with the commenter that the user guide must be adopted as a rule and/or be subject to public comment for the preceding reasons, the Department has changed proposed §5.603 in this adoption to clarify that the user guide established in accordance with SECTION 4 of SB 1670 (Acts 2005, 79th Leg., R.S., chap. 892, SB 1670 sec. 4) will provide guidance to insurers on how to comply with the requirements and procedures specified in §§5.601 - 5.611. Additionally, as a result of this change, the Department has changed the definition in proposed §5.602 as adopted to define the term user guide instead of the term manual. The Department has also changed proposed §§5.604(c) and (e); 5.605(d) and (e); 5.606(c), (d), (e) and (f); and 5.608(j) as adopted, and has also deleted proposed §§5.607(j) and 5.608(k) in their entirety, to remove proposed references to manual requirements that the Department has determined are no longer necessary because of the change to §5.603 as adopted.

Several commenters questioned whether SB 1670 authorizes the program to verify financial responsibility for both owners and drivers of motor vehicles. Some commenters also questioned whether the driver of a motor vehicle could use his personal insurance to satisfy the requirements of the Texas Motor Vehicle Safety Responsibility Act and the program when the owner of the vehicle does not have appropriate motor vehicle insurance. Another commenter argued that SB 1670 contemplated only whether owners of motor vehicles had established financial responsibility, and did not expand the program to incorporate operators of motor vehicles. The commenter noted that the Legislature could have crafted the bill to include both owners and operators had it chosen to do so. The Department disagrees that SB 1670 limits the program solely to verifying whether the registered owner of a motor vehicle has established financial responsibility for that vehicle. Rather, the program extends to verifying compliance with the Texas Motor Vehicle Safety Responsibility Act as indicated by the SB 1670 requirement that the program be most likely to employ a method of compliance that improves public convenience. Transportation Code §601.051(1) provides that a person may operate a motor vehicle if the person has established financial responsibility for the vehicle through an insurance policy that complies with Transportation Code, Chapter 601, Subchapter D. Transportation Code §601.071 provides that acceptable insurance may be in the form of an owner or operator's policy. To the extent that an operator is entitled under law to comply with the Texas Motor Vehicle Safety Responsibility Act via an operator's policy, the convenience of the program would be diminished if the program did not provide a means for the operator to have that compliance verified. This rule does not change the requirements of how a person can establish financial responsibility under the Texas Motor Vehicle Safety Responsibility Act. This adoption refers herein to the term driver rather than operator, but as used herein the two terms have the same meaning. The Department has revised proposed §5.602 definitions of event based process and match rate and §5.607 and adopted them without references to term driver and/or motorist in order to clarify that the scope of the program applies to verification of coverage and also to indicate that the program responses will be to specific insurance verification inquiries.

Commenters were concerned that the term covered individuals in proposed §5.604(c) could be confusing because, under a standard personal automobile insurance policy, any authorized individual could be covered. A commenter recommended changing covered individuals to listed individuals. The Department agrees that clarification is needed. However, it is the Department's position that changing the subsection to include listed driver would provide sufficient clarification, and the word driver is consistent with the required reporting fields specified in §§5.604(c), 5.607(e), and 5.608(d) that reference driver. In accordance with the purpose of SB 1670, it is not the Department's intent to address all possible coverage scenarios, but rather to require the necessary information to identify those persons associated with the insurance policy. The use of the term covered in the proposed §5.604(c) was an inadequate expression of this purpose. Substituting the term listed driver, meaning a driver listed on a personal automobile insurance policy, in place of covered individual should clarify this reporting requirement and provide the vendor with sufficient information for more efficient data matching, including cascading data matching. Additionally, while it may be inferred from the context of the proposal, a statement limiting this information to policies in force in Texas is necessary to clarify the insurance policy information required to be submitted to the vendor under §5.604(c). Therefore,

the Department has changed proposed §§5.604(c) and (c)(4), 5.607(e)(2) and (4) - (6), and 5.608(d)(4) as adopted, to require the insurer to report each listed driver. These changes clarify the reporting requirement and confirm that the reporting requirement is part of the program and will also provide the necessary information for the vendor to carry out the program. In connection with this change, the term listed driver, meaning a driver listed on a personal automobile insurance policy, has been added as a definition in adopted §5.602(14). For reasons stated in the following comment and response, the definition of listed driver does not include named excluded drivers. Also the descriptive phrase in Texas has been added to adopted §5.604(c) to clarify that the required insurance policy information to be reported by the insurer to the vendor are those policies that are in force in Texas. In connection with these changes, the Department has made nonsubstantive grammatical changes to these subsections.

In related comments, some commenters questioned whether named excluded driver data would have to be reported under the proposed text. Some commenters argued that reporting named excluded drivers was unnecessary and not required under the program. Conversely, some commenters argued for requiring the reporting of named excluded driver data. While the Department is aware that one of the implementing agencies believes that named excluded driver information will enable it to achieve what it has determined to be an objective of the legislation, the Department is also aware that the insurance industry, including through the working group, has objected to the required reporting of named excluded driver information as being unnecessary and burdensome. As a result of these differing views, the Department has decided to seek legislative clarification on whether the named excluded driver information should be required in the implementation of the program. In the meantime, however, the Department encourages insurers to report named excluded driver information. Concomitantly, the Department has decided at this time that named excluded drivers who are not offered coverage under the insurance policy are not to be considered within the definition of listed driver and, as such, are not required to be reported to the vendor under adopted §§5.604(c) and (c)(4), 5.607(e)(2) and (4) - (6), and 5.608(d)(4). To clarify this exclusion, the Department has included language in the adopted §5.602(14) definition of listed driver, which has been added as a result of other comments, to provide that a listed driver is a driver listed on a personal automobile insurance policy, not including a named excluded driver to whom no coverage is offered under the insurance policy. The criteria for reporting such information will be outlined in the user guide.

Many commenters argued that the 98 percent match rate is unobtainable and unreasonable at the onset of the program. They claimed that the highest required rate in other states is 92 percent and that the industry average is 75 - 80 percent. The Department believes that a 98 percent match rate is obtainable due to the matching criteria and methods; however, the Department will postpone the 98 percent match rate requirement until January 1, 2010. Alternatively, an interim 95 percent rate will be required beginning January 1, 2008. Insurers will be responsible for providing accurate data to ensure that their insurance policy records match to a registered vehicle. In addition to cleaning up the data, the initial error correction and database clean-up procedure should also identify and eliminate those vehicles and/or policies that are not required to be included as a match for purposes of the program. Additionally, matching is not based solely on directly matching each piece of data for an entire insurance policy record. Rather, the program will rely on both direct matches and partial matches. For the database system, the vendor will develop and use cascading data matching algorithms that are designed to analyze possible, but not exact, matches and determine if it is more likely than not that a vehicle matches with the insurance policy in question. Under the web services program, the web services insurer is required to develop a similar algorithm, but may be able to refine the algorithm more to fit its particular set of data. The additional information required by the program is designed to increase match rates. The Department notes that Utah, Colorado, and New Mexico are currently close to meeting a 98 percent match rate. However, the Department recognizes that the optimal match rate may need to be achieved over a period of time and, based on comments, has changed proposed §5.605(b) and §5.606(g) as adopted to require a match rate of 95 percent by January 1, 2008, with an increase to a 98 percent match rate by January 1, 2010.

Commenters expressed concern that the March 31, 2007 requirement to commence reporting data in the database system provided insufficient preparation time due to insurer staff limitations and other insurer projects. One commenter estimated that it could take 3,200 hours of programming time to comply with program requirements. Additionally, commenters were concerned that the March 31, 2007 date did not comply with the SB 1670 mandate that the rules and user guide be in place for at least seven months before full implementation of the program was required. Conversely, other commenters stated that they could be ready to begin reporting on or before January 1, 2007. The Department disagrees with the assertion that the requirement to begin data reporting equates to the full implementation of the program. The Department believes that full implementation will occur when the program is ready for use by the end users. The Department does recognize that a substantial amount of resources may be required for some insurers to develop the required reporting program and that those insurers may have limited staff. As such, the Department has established June 30, 2007, as the new database system reporting requirement deadline in adopted §5.604(b). In conjunction with this change, the Department has also changed proposed §5.609 as adopted to adjust when new insurers and insurers' managing general agents (MGA) delegated under §5.609 must begin submitting data under the new sections §§5.601 - 5.611.

In both the database and web services systems, the insurers will be responsible for evaluating the data errors, communicating data errors to their policyholders, and making any corrections that are possible. Some commenters were concerned about the potentially significant error correction costs. Other commenters were concerned that the proposal specified the timing, frequency, and manner of the required policyholder error correction communication. Commenters argued that insurers and agents know best how to communicate with customers; that the requirements added an unnecessary expense; and that, historically, such notices had generated limited response in other states. The Department is aware that the cost of error correction may indeed be significant, especially at the onset of the program. In consideration of these comments, the Department has modified proposed §§5.605(e), 5.606(f), and 5.607(f) as adopted to require only one error notice be sent to the policyholder and to allow that notice to be in a form chosen by the insurer. The proposal cost note recognized that, based on experience in other states, initial error rates of 20 percent could reasonably be expected. Such error rates could

result in thousands to hundreds of thousands of error notices and additional communications between insurers and their customers for each insurer. To reduce matching errors and their associated costs, the program requires several types of insurer data for use in cascading matching algorithms to increase the match rate. It should also be noted that the adopted sections do not require the insurer to take additional efforts to correct data beyond communicating errors to their policyholders and updating their records when, and if, the policyholder provides the insurer additional information. Therefore, based on comments and the anticipated costs to insurers, the Department has changed proposed §§5.605(e), 5.606(f), and 5.607(f) with respect to the frequency and manner of providing error notices to customers. Under the adopted sections, the insurer will be required to provide a single notice to the insured in a manner of the insurer's choosing. The database insurer will be required to communicate a request to the policyholder to provide confirming or corrected information within 10 calendar days after receiving the error notice from the vendor. The web services insurer will be required to communicate a request to the policyholder to provide confirming or corrected information within 10 calendar days after discovering the error. The form of communication is not specified in the adopted sections, but is left to the insurer's discretion. The Department and vendor may review these notices during the auditing process. The insurer will not be required to provide additional error notices; however, the insurer may provide additional notices both to attempt to boost the insurer's match rate and/or avoid customer inconvenience. Because of the changes in the frequency and manner of the required communications, the Department has also made several nonsubstantive grammatical and other editorial changes to proposed §§5.605(e) and 5.606(f) as adopted.

A commenter asked for clarification that §5.605(g) meant that the vendor will be sending verification transactions to insurers as part of the program. The commenter suggested clarifying the subsection by changing the language of this subsection to read each database insurer must assist the vendor in auditing the database program. The Department declines to make the suggested change. The vendor will be reporting some verification transactions to the insurer to confirm the efficiency and reliability of the cascading data matching system. To the extent the vendor needs to confirm a cascading match, the vendor will be required to request such confirmation from the insurer. However, in reviewing proposed §5.605(g), the Department has determined that the last sentence of that subsection is not a requirement related to confirming cascading data matching, but instead is a statement describing cascading data matching and, therefore, is more appropriately included in the definition of cascading data matching. As such, the Department has removed the sentence cascading data matching may not result in a 100 percent match of all fields, but a match may be made with a reasonable degree of accuracy from proposed §5.605(g) as adopted and added the sentence to the definition of cascading data matching in proposed §5.602(2) as adopted.

A commenter requested that database insurers have access to TxDOT and DPS data containing registered vehicles and their vehicle identification numbers (VIN) as part of the database error correction process. The Department declines to make this a part of the database program. Some TxDOT information will be available to web services insurers to allow them to perform data cleaning and matching functions that are necessary for compliance with the rule. It is not clear why an insurer would need to duplicate the efforts of the vendor in the database system and, as such, delivery of TxDOT data is not part of the database system. However, as DPS data will not be part of the web services system data clean-up process, the Department has also changed proposed §5.606(f)(5) as adopted to remove the reference to DPS data.

Also with respect to error correction, a commenter requested that the Department add to the rule a statement that the vendor will send error notices to an insurer's delegated managing general agent (MGA) under adopted §5.609(a). The Department agrees to make this change in proposed §§5.605(e); 5.606(f); and 5.608(e), (f), and (g) as adopted. Additionally, for clarification purposes, the Department has also included a definition of the term delegated MGA in adopted §5.602(8): a Department licensed managing general agent operating on behalf of an insurer through a delegation contract with that insurer under §5.609(a) of this subchapter (relating to Delegation and New Insurers). The Department has changed §§5.605(e); 5.606(f); and 5.608(e), (f), and (g) to clarify that error correction and TxDOT file data information will be sent to both the insurer and its designated MGA. The Department, however, has not added the term delegated MGA to every reference to insurer in adopted §§5.601 - 5.611, because adopted §5.609(a) clearly states that the delegated MGA is jointly and severally responsible for meeting the insurer's program requirements. As such, if the requirement applies to the insurer, then the requirement applies to the delegated MGA. However, the comment indicates that this relationship was not definitive in the proposal. Therefore, to further clarify that the delegated MGA will stand in the place of the insurer with respect to the requirements of §§5.601 - 5.611, the Department has added to the first sentence of proposed §5.609(a) as adopted the statement that, to the extent an insurer has contractually delegated any requirement of §§5.601 - 5.611 to an MGA, the MGA shall be deemed an insurer for the purposes of §§5.601 - 5.611.

Also as to delegated MGAs, a commenter inquired if an insurer could delegate to more than one MGA. The Department has made a change to proposed §5.609(a) to clarify that this is allowed. The Department notes that it is the responsibility of the insurer and MGAs to clearly delineate insurance policy program responsibilities in a delegation agreement or potentially become jointly and severally responsible for compliance on all of the insurer's policies. Further, a commenter requested that newly appointed MGAs be treated as new insurers so that data they are responsible for submitting would not be due for 30 days. The Department agrees with this change. To effect this change, the Department has added §5.609(d) to the adopted text to state that an MGA has the same reporting options as an insurer and that an MGA subsequently contracting with an insurer must begin reporting in the same manner as an insurer under adopted §5.609(b) and (c). The Department has also made a nonsubstantive correction to the reference to the title of §5.606 in proposed §5.609(b) as adopted.

A commenter argued that the penalty provisions are inappropriately severe and requested that a willful or knowing requirement be added to proposed §5.610. The Department disagrees that the penalty provisions are overly harsh. The penalty provisions are established by statute. The standard for enforcement under each statute is established by that particular statute and cannot be modified by rule. However, to clarify how the provisions will operate procedurally, the Department has changed proposed §5.610(a) as adopted to read the commissioner may, after opportunity for notice and hearing, discipline an insurer or license holder under Insurance Code Chapters 82, 83, and 84, and any

other applicable law if the commissioner determines the insurer or license holder is in violation of, or has failed to comply, with any of the requirements of §§5.601 - 5.611.

Adopted §5.601 states the basic purpose and scope of the new division, §§5.601 - 5.611. Adopted §5.602 provides definitions for certain terms used in the division. Adopted §5.603(a) describes that the Financial Responsibility Verification Program Guide and User Manual (user guide), established in accordance with SECTION 4 of SB 1670 (Acts 2005, 79th Leg., R.S., chap. 892, SB 1670 sec. 4), will provide technical guidance to insurers on how to comply with the requirements and procedures specified in §§5.601 - 5.611. The user guide specifications are subject to change based on technology or program experience. Such changes to the user guide shall not affect the substantive requirements of this division. Adopted §5.604 sets forth the reporting requirements for insurers using the database program, including specifying that data must be reported weekly; that reporting should commence no later than June 30, 2007; and the types of data that must be reported. Adopted §5.605 specifies required match rates and data error correction requirements and procedures for insurers using the database program, including the response time for general data submission errors, and directs the insurer to make at least one attempt to communicate non-matching policy errors to the policyholder within 10 calendar days of receiving the error notice. Section 5.605 also establishes that insurers with less than 1,000 policies are required to work with the vendor to establish alternate reporting procedures. Adopted §5.606 establishes the development time frame and submission requirements for insurers using the web services program. Section 5.606 also establishes a submission review and appeal process. Section 5.606 further sets forth web services system testing and error correction procedure requirements for web services insurers, including that the insurer must make at least one attempt to communicate this error to the policyholder within 10 calendar days of discovering the error. Adopted §5.607 establishes the web services system requirements for insurers electing to use the web services program. These requirements include that a web services insurer must design, develop, and maintain a web services system; design a matching program algorithm that can match specified insurer information to vendor supplied TxDOT data; comply with XML transmission standards and protocols; and comply with specified procedures relating to data confidentiality and security standards. Adopted §5.608 specifies the web services program performance requirements for insurers electing to use the web services program. These requirements include accepting and responding to insurance verification inquiries from the vendor within certain time frames, specifying required formats for responses and data submitted with the responses, and specifying required program match rates and procedures for performing ongoing verification program matches. Adopted §5.609 provides that insurers may delegate certain aspects of program compliance, but not responsibility for compliance, to one or more managing general agents (MGA). Section 5.609 also sets forth how insurers and MGAs entering the Texas market after the effective date of this adoption must comply with this division. Adopted §5.610 references Insurance Code provisions applicable to persons violating the adopted sections and specifies that all persons are subject to criminal penalty for unauthorized disclosure or use of program information under Transportation Code §601.454(d). Adopted §5.611 describes the voluntary test program and sets forth the means for participating insurers to test the program and obtain approval from the implementing agencies for use in Texas.

SUMMARY OF COMMENTS AND AGENCY'S RESPONSE.

General: Commenters were concerned that privacy issues are not adequately addressed in the proposed rule.

Agency Response: The Department and other implementing agencies take privacy issues very seriously and expect compliance with all applicable privacy laws. The program vendor will be contractually required to maintain the data and operate the system in a manner that will sufficiently protect the privacy of motor vehicle owners and drivers and safeguard the security and integrity of insurance company information. The program vendor and all program users are also subject to applicable privacy laws and associated penalty provisions, including the criminal penalty provisions set forth in Transportation Code §601.454(d).

General: A commenter argued that insurance data matching systems are expensive to set up and maintain for states, insurers, and the public. The commenter further argued that there is no conclusive and undisputed evidence that they reduce uninsured driving and that the program is, thus, not cost effective.

Agency Response: To the extent that this comment goes to whether Texas should have a verification program, the Texas Legislature determined that it should when it adopted SB 1670, 79th Legislature, Regular Session. If the comment goes to the type of program that should be implemented, the Department disagrees with this assertion. The Department and other implementing agencies reviewed alternative systems and existing programs in other states. Following that review, the Department and the other implementing agencies established the program as being most likely to accomplish the statutory goals set forth in Transportation Code §601.452(a), including reducing the number of uninsured motorists and being cost effective. However, the Department recognizes that changes in technology may offer better solutions in the future. In anticipation of this possibility, adopted §5.611 sets out a procedure by which insurers may test, demonstrate, and obtain implementing agency approval as an alternative to the current program systems.

General: Several commenters argued that the vendor should be selected before the adoption of the rule.

Agency Response: The Department disagrees that the vendor must be selected prior to the adoption of these rules. SB 1670 does not require that the vendor be selected before the rule is adopted. Additionally, Transportation Code §601.453(a) does not list development of rules within the scope of work the vendor is required to perform for the program. The vendor is also not required to select the type of information that insurers can be required to provide in these rules. Rather, Transportation Code §601.454(b) states that the vendor will be required to use the information that is determined to be necessary by the implementing agencies to carry out Transportation Code, Chapter 601 Subchapter N. This adoption sets forth insurer information that the implementing agencies have determined to be necessary to carry out Transportation Code, Chapter 601, Subchapter N. Finally, §601.453(c) states that the vendor's contract cannot have more than a five-year term, but Transportation Code, Chapter 601, Subchapter N, does not have a corresponding time limitation on the rules that are to be adopted under that subchapter or a requirement that rules must be changed for each future vendor.

General: One commenter was concerned that other state agencies had not jointly published their rules as required by Transportation Code §601.452(b) and §502.1715.

Agency Response: The Department disagrees that Transportation Code §601.452(b) §and 502.1715 require the implementing agencies to join in a single rule adoption, to adopt the same rules simultaneously, or even for each agency to adopt rules. A joint adoption by four agencies would be a cumbersome project and could require agencies to adopt rules unrelated to their functional areas and potentially exceeding their legal authority. SB 1670, SECTION 4, thus clarifies the rule requirement when it states that the agencies responsible for implementing Subchapter N, Chapter 601, Transportation Code, as added by this Act, shall adopt rules and establish and publish a user guide clearly specifying requirements and procedures for providing information under the verification program under that subchapter not later than seven months before the full implementation of the program. The Department considers this reference to the agencies responsible to be a legislative directive that each agency is to adopt rules that are necessary and required for that agency to administer its responsibilities under the program. This directive is substantively different from SB 1670 references to the implementing agencies. As such, jointly is an instruction that the implementing agencies shall cooperate in determining their individual agency responsibilities. The implementing agencies may adopt rules as necessary to administer their individual agency program requirements. Moreover, none of the other implementing agencies objected to the Department's proposal.

General: A commenter objected that the implementing agencies will determine when it is feasible to include commercial policies and wanted insurers to be involved in the decision.

Agency Response: SB 1670, SECTION 4, specifically requires the implementing agencies to determine when it is feasible to implement the program for vehicles covered under a commercial insurance policy. As stated in this adoption, commercial policy requirements will be added by rule at a later date through a separate rulemaking process. All persons will have an opportunity to comment on that rule proposal.

Public Benefit/Cost Note: Commenters were concerned that the Department failed to accurately estimate the costs large insurers will incur in designing programs to collect the required data for submission to the vendor. Several commenters argued that 80 hours of implementation time and $500 yearly operational costs greatly underestimate the time and costs that insurers will incur to implement and support the program. A commenter estimated up to 3,200 hours of implementation time; $1.3 million implementation costs; and $340,000 yearly operational costs. Conversely, some commenters indicated the $80,000 amount and lower maintenance amounts were in line with their expectations.

Agency Response: The program applies to insurers issuing a few thousand policies to several million policies in the state of Texas. The $80,000 and $1.3 million dollar amounts stated in the cost note in the Department's notice of proposal, published in the September 8, 2006, edition of the *Texas Register* (31 TexReg 7226), were examples of costs that had either been provided to the Department or provided in testimony to the Texas Legislature. They were not stated as exact figures for this program, but were used to buttress the Department's program cost note estimate range in the preceding sentence. That sentence reads: total probable economic costs to each insurer to comply with this proposal will vary based on whether the insurer opts to participate in the database program or the web services program and is estimated to be within the range of several thousand to several million dollars per insurer depending on several factors discussed in this cost note. (cost note, 31 TexReg 7228). Those factors were summarized in that same paragraph as an insurer's costs will depend on the insurer's existing data systems, existing staff, number of policyholders, and quality of data. (cost note, 31 TexReg 7228) The Department further elaborated with respect to the cost of error correction that it had received information based on experience in other states that initial policy error rates of 20 percent could reasonably be expected. Such error rates would result in thousands to hundreds of thousands of error notices and additional communications between insurers and their customers. The cost note, however, did not simply give broad estimates but identified sources of costs and associated employee costs for the design, maintenance and error correction phases of the program. These sources of costs and job functions were not disputed. As to the cost of employees performing certain tasks, those values were based on the average wage for that type of job for the industry as published by the Texas Workforce Commission. If an insurer chooses to pay a different wage for a job type, that is a business choice for that insurer and not a cost that can be reflected in a cost note. Finally, several commenters, primarily representing small or medium sized insurers, stated that the cost note was in line with their expectations. As such, the Department does not believe the cost note was incorrect or understated.

Public Benefit/Cost Note: Several commenters argued that the legislative goal of the program was not insurance claim confirmation.

Agency Response: The Department agrees that this is not a stated goal of the legislation and the program is not intended or contemplated to confirm insurance coverage for claims processing purposes. As published in the cost note in the Department's notice of proposal published in the September 8, 2006, edition of the *Texas Register* (31 TexReg 7226), the statement reduction of . . . and the expense and delay in resolving personal automobile insurance claims is an opinion that a potential benefit of reducing the number of uninsureds might also be to reduce the expense and delay in resolving personal automobile insurance claims.

§5.602: A commenter suggested a definition for commercial automobile insurance policies.

Agency Response: The Department declines to make the suggested change. The implementing agencies will determine when it is feasible to add commercial insurance policies to the program and at that time the implementing agencies will define the types of commercial motor vehicle insurance policies to be covered by the program. Additionally, the Department does not believe that this definition is necessary for the implementation of the adopted sections. §5.602(2) and §5.605(g): A commenter asked for clarification that §5.605(g) meant that the vendor will be sending verification transactions to insurers as part of the program. The commenter suggested clarifying the subsection by changing the language of this subsection to read each database insurer must assist the vendor in auditing the database program.

Agency Response: The Department declines to make the suggested change. The vendor will be reporting some verification transactions to the insurer to confirm the efficiency and reliability of the cascading data matching system. To the extent the vendor needs to confirm a cascading match, the vendor will be required to request such confirmation from the insurer. However, in reviewing proposed §5.605(g), the Department has de-

termined that the last sentence of that subsection is not a requirement related to confirming cascading data matching, but instead is a statement describing cascading data matching and, therefore, is more appropriately included in the definition of cascading data matching. As such, the Department has removed the sentence cascading data matching may not result in a 100 percent match of all fields, but a match may be made with a reasonable degree of accuracy from proposed §5.605(g) as adopted and added the sentence to the definition of cascading data matching in proposed §5.602(2) as adopted.

§5.602(11) and (15) and §5.607(a): Several commenters questioned whether SB 1670 authorizes the program to verify financial responsibility for both owners and drivers of motor vehicles. Some commenters also questioned whether the driver of a motor vehicle could use his personal insurance to satisfy the requirements of the Texas Motor Vehicle Safety Responsibility Act and the program when the owner of the vehicle does not have appropriate motor vehicle insurance. Another commenter argued that SB 1670 contemplated only whether owners of motor vehicles had established financial responsibility and did not expand the program to incorporate operators of motor vehicles. The commenter noted that the Legislature could have crafted the bill to include both owners and operators had it chosen to do so.

Agency Response: The Department disagrees that SB 1670 limits the program solely to verifying whether the registered owner of a motor vehicle has established financial responsibility for that vehicle. Rather, the program extends to verifying compliance with the Texas Motor Vehicle Safety Responsibility Act as indicated by the SB 1670 requirement that the program be most likely to employ a method of compliance that improves public convenience. Transportation Code §601.051(1) provides that a person may operate a motor vehicle if the person has established financial responsibility for the vehicle through an insurance policy that complies with Transportation Code, Chapter 601, Subchapter D. Transportation Code §601.071 provides that acceptable insurance may be in the form of an owner or operator's policy. To the extent that an operator is entitled under law to comply with the Texas Motor Vehicle Safety Responsibility Act via an operator's policy, the convenience of the program would be diminished if the program did not provide a means for the operator to have that compliance verified. This rule does not change the requirements of how a person can establish financial responsibility under the Texas Motor Vehicle Safety Responsibility Act. This adoption refers herein to the term driver rather than operator, but as used herein have the same meaning. The Department has revised proposed §5.602 definitions of event based process and match rate and §5.607, and adopted them without references to the term driver and/or motorist in order to clarify that the scope of the program applies to verification of coverage and also to indicate that the program responses will be to specific insurance verification inquiries.

§§5.602(14), 5.604(c), 5.607(e), and 5.608(d): Commenters were concerned that the term covered individuals in proposed §5.604(c) could be confusing because, under a standard personal automobile insurance policy, any authorized individual could be covered. A commenter recommended changing covered individuals to listed individuals.

Agency Response: The Department agrees that clarification is needed. However, it is the Department's position that changing the subsection to include listed driver would provide sufficient clarification; and the word driver is consistent with the required reporting fields specified in §§5.604(c), 5.607(e), and 5.608(d) that reference driver. In accordance with the purpose of SB 1670, it is not the Department's intent to address all possible coverage scenarios, but rather to require the necessary information to identify those persons associated with the insurance policy. The use of the term covered in the proposed §5.604(c) was an inadequate expression of this purpose. Substituting the term listed driver, meaning a driver listed on a personal automobile insurance policy, in place of covered individual should clarify this reporting requirement and provide the vendor with sufficient information for more efficient data matching, including cascading data matching. Additionally, while it may be inferred from the context of the proposal, a statement limiting this information to policies in force in Texas is necessary to clarify the insurance policy information required to be submitted to the vendor under §5.604(c). Therefore, the Department has changed proposed §§5.604(c) and (c)(4), 5.607(e)(2) and (4) - (6), and 5.608(d)(4) as adopted, to require the insurer to report each listed driver. These changes clarify the reporting requirement and confirm that the reporting requirement is part of the program and will also provide the necessary information for the vendor to carry out the program. In connection with this change, the term listed driver, meaning a driver listed on a personal automobile insurance policy, has been added as a definition in adopted §5.602(14). For reasons stated in the following comment and response the definition of listed driver does not include named excluded drivers. Also the descriptive phrase in Texas has been added to adopted §5.604(c) to clarify that the required insurance policy information to be reported by the insurer to the vendor are those policies that are in force in Texas. In connection with these changes, the Department has made nonsubstantive grammatical changes to these subsections.

§5.602(14): In related comments, some commenters questioned whether named excluded driver data would have to be reported under the proposed text. Some commenters argued that reporting named excluded drivers was unnecessary and not required under the program. Conversely, some commenters argued for requiring the reporting of named excluded driver data.

Agency Response: While the Department is aware that one of the implementing agencies believes that named excluded driver information will enable it to achieve what it has determined to be an objective of the legislation, the Department is also aware that the insurance industry, including through the working group, has objected to the required reporting of named excluded driver information as being unnecessary and burdensome. As a result of these differing views, the Department has decided to seek legislative clarification on whether the named excluded driver information should be required in the implementation of the program. In the meantime, however, the Department encourages insurers to report named excluded driver information. Concomitantly, the Department has decided at this time that named excluded drivers who are not offered coverage under the insurance policy are not to be considered within the definition of listed driver and, as such, are not required to be reported to the vendor under adopted §§5.604(c) and (c)(4), 5.607(e)(2) and (4) - (6), and 5.608(d)(4). To clarify this exclusion, the Department has included language in the adopted §5.602(14) definition of listed driver, which has been added as a result of other comments, to provide that a listed driver is a driver listed on a personal automobile insurance policy, not including a named excluded driver to whom no coverage is offered under the insurance policy. The criteria for reporting such information will be outlined in the user guide.

§5.602(15) and §5.605: Several commenters were concerned that the data matching process and criteria were not defined.

Agency Response: The Department believes the process is adequately described in the adopted sections. Match rate is defined in adopted §5.602(15) as the percentage of insurance policy records matched to vehicles, divided by the total number of all insurance policy records. Matching will be done either by the vendor in the database system or by the web services insurer in the web services system. Matches can be established through direct matches of fields, such as VINs, and through the use of cascading data algorithms. The algorithms will be developed either by the vendor for the database system or by the insurer for the web services system.

§5.602(17): A commenter was concerned that the reference to stationary mobile home trailers in the definition of personal automobile insurance policy could include stationary mobile homes covered under automobile insurance policies and suggested a change to the definition.

Agency response: The Department declines to make the suggested change. The reference to trailers is based on the definition of a motor vehicle in Transportation Code §601.001(5). The Department considered revising the definition of a personal automobile insurance policy but, in considering all aspects of the terminology, was unable to create a more satisfactory definition than the proposed definition of personal automobile insurance policy. The issue raised in this comment may be limited to some extent because it will depend on the number of mobile homes that are covered under a motor vehicle insurance policy. To the extent such policies are reported, the Department expects that issues related to those policies will be resolved during the data clean-up phase of the program.

§§5.602(23); 5.603; 5.604(c) and (e); 5.605(d) and (e); 5.506 (c), (d), (e) and (f); 5.607(j); and 5.608(j) and (k): The Department received a comment questioning the Department's compliance with the Administrative Procedures Act (APA), Government Code, Chapter 2001. More specifically, the commenter argued that, since the user guide creates requirements that insurers could be sanctioned for violating, the user guide must be adopted separately as a rule or as part of the proposed rule. Additionally, the commenter objected to the proposal because a completed user guide was not available for review at the same time as the proposed rule and, thus, claimed that proper notice of the rule was not given pursuant to the APA. Several other commenters also complained about the lack of a user guide for review and comment before the adoption of the proposal.

Agency Response: The Department disagrees with these assertions and argues that they are contrary to the language of SB 1670. Under SB 1670, the Legislature specifically granted rulemaking authority to administer, or carry out, Transportation Code, Subchapter N, in Transportation Code §601.452(b) and §502.1715(b). However, while SB 1670 provides clear instruction to adopt rules, it does not state that the user guide is to be adopted by rule or as a rule. Instead, SB 1670, SECTION 4, provides clear instruction that the agencies responsible for implementing Subchapter N, Chapter 601, Transportation Code, as added by this Act, shall adopt rules and establish and publish a user guide clearly specifying requirements and procedures for providing information under the verification program under that subchapter. As such, the user guide is not a rule, or required to be part of the rules to be adopted to administer, or to carry out, Transportation Code, Chapter 601, Subchapter N. Transportation Code §601.452 sets forth the requirement to establish the program. Transportation Code §601.453 describes the program agent (herein called the vendor) and the scope of the vendor's contract. Transportation Code §601.454 requires insurance companies to submit data determined by the implementing agencies as necessary for the vendor to carry out the program. This adoption sets forth the insurance policy information that the implementing agencies have determined will be necessary for the vendor to carry out the program and implements the requirement that the insurer must provide that information to the vendor. The user guide does not create these requirements.

The user guide will contain references to statutes of this state and these adopted sections. However, to that end, the user guide is just a reference tool because the user guide cannot alter the referenced statutes or the adopted sections. What the user guide will do is explain how the information required under this adoption is to be submitted. As such, while the user guide will have general applicability to insurers, it is questionable whether, under Government Code §2001.003(6), the user guide constitutes a state agency statement that either implements, interprets, or prescribes law or policy; or describes the procedure or practice requirements of a state agency. The Department's interpretation is that, as a document, the user guide does not meet the §2001.003(6) definition of a rule.

As to the question of opportunity to comment on the user guide, the Department disagrees that this is a requirement under SB 1670 or the APA. The user guide is not a rule. It does not create the obligation to submit data to the vendor. Neither the APA nor SB 1670 requires public comment on the user guide. However, although not required, the Department has solicited comments from the public and users on a draft user guide, including publishing notice of a draft user guide for comment in the October 20, 2006, issue of the *Texas Register* (31 TexReg 8766).

In summary, the Legislature identified the rules to be adopted and specifically did not require the user guide to be adopted by reference or as a separate rule. Further, the user guide does not fit within the scope of a rule as defined by Government Code §2001.003. The adopted sections administer the program, including specifying the information that the implementing agencies have determined to be necessary for the vendor to carry out the program and implementing the requirement for the insurers to submit that data to the vendor. The user guide provides guidance for complying with those sections.

While the Department disagrees with the commenter that the user guide must be adopted as a rule and/or be subject to public comment for the preceding reasons, the Department has changed proposed §5.603 in this adoption to clarify that the user guide established in accordance with SECTION 4 of SB 1670 (Acts 2005, 79th Leg., R.S., chap. 892, SB 1670 sec. 4) will provide guidance to insurers on how to comply with the requirements and procedures specified in §§5.601 - 5.611. Additionally, as a result of this change, the Department has changed the definition in proposed §5.602 as adopted to define the term user guide instead of the term manual. The Department has also changed proposed §§5.604(c) and (e); 5.605(d) and (e); 5.606(c), (d), (e) and (f); and 5.608(j) as adopted, and has also deleted proposed §5.607(j) and §5.608(k) in their entirety, to remove proposed references to manual requirements that the Department has determined are no longer necessary because of the change to §5.603 as adopted.

§5.603: Several commenters suggested that procedural details would be more appropriately placed in the user guide and wanted the rule to allow for more flexibility.

Agency Response: The Department declines to make any changes based on this comment. As discussed in the prior comment, the user guide and the adopted sections fulfill different functions with respect to the program. As such, it is not simply a matter of making one flexible and the other detailed. The adopted sections set forth administrative requirements, specify the information that must be submitted to the vendor under the program, and establish the requirement to submit that information. The user guide instructs insurers as to the format and the procedure for submitting the information to the vendor.

§5.603: A commenter wanted the opportunity for notice and comment before any future changes are made to the user guide. Another commenter argued that the user guide should be able to override any specific details in the adopted sections if the changes were agreed to through a consensus among the insurers and agencies.

Agency Response: The Department declines to make any changes based on this comment. As previously stated, the user guide is not a rule, and SB 1670 does not require public comment on the user guide or a consensus between insurers and the implementing agencies. Additionally, adopted §5.603 makes it clear that any changes made to the user guide cannot alter the requirements in §§5.601 - 5.611. However, the Department anticipates informally soliciting public comments on any future changes to the user guide that are substantive and/or extensive in nature.

§5.604(b) and §5.609: Commenters expressed concern that the March 31, 2007 requirement to commence reporting data in the database system provided insufficient preparation time due to insurer staff limitations and other insurer projects. One commenter estimated that it could take 3,200 hours of programming time to comply with program requirements. Additionally, commenters were concerned that the March 31, 2007 date did not comply with the SB 1670 mandate that the rules and user guide be in place for at least seven months before full implementation of the program was required. Conversely, other commenters stated that they could be ready to begin reporting on or before January 1, 2007.

Agency Response: The Department disagrees with the assertion that the requirement to begin data reporting equates to the full implementation of the program. The Department believes that full implementation will occur when the program is ready for use by the end users. The Department does recognize that a substantial amount of resources may be required for some insurers to develop the required reporting program and that those insurers may have limited staff. As such, the Department has established June 30, 2007 as the new database system reporting requirement deadline in adopted §5.604(b). In conjunction with this change, the Department has also changed proposed §5.609 as adopted to adjust when new insurers and insurers' managing general agents (MGA) delegated under §5.609 must begin submitting data under the new sections §§5.601 - 5.611.

§5.604(c): Some commenters opined that weekly data submissions are unwieldy and noted technological difficulties and time constraints with weekly reporting. These commenters suggested a bi-weekly or monthly data reporting requirement. Conversely, some commenters were satisfied with weekly reporting and/or wanted an allowance to increase the frequency to daily reporting to attain accuracy.

Agency Response: The Department declines to make any of these suggested changes. A goal of the program is to minimize public and user inconvenience that could result from unmatched vehicles due to lack of data timeliness, especially for new vehicles. The weekly submission requirement in the adopted §5.604(c) should accomplish that goal while not placing too great a burden on insurers. More frequent submissions, however, were not considered in the proposal and may be unduly burdensome on insurers.

§5.604(c): Many commenters stated that the database program requires excessive and/or non-useful information. Some commenters suggested allowing reporting of alternate data. Conversely, some commenters were generally satisfied with the data requirements and felt the required data will lead to a better match rate.

Agency Response: The Department and the other implementing agencies have determined the information to be necessary for the vendor to carry out the program. As stated in a prior comment response, insured driver information may be useful in verifying compliance with the Texas Motor Vehicle Safety Responsibility Act under Transportation Code §601.051 and §601.071. Additionally, more information will assist the vendor in developing and implementing cascading matching algorithms that will enhance match rates and match rate accuracy. Limited information would result in a lower match rate. Increased program match rates through cascading matching algorithms should improve the public convenience by reducing the number of individuals who may be unnecessarily identified as uninsured. In addition, an increased match rate will reduce insurer error correction expenses due to less error reports.

§5.604(c): A commenter was concerned about how international driver's licenses would work within the program. The commenter also questioned if the program would allow for alpha prefixes on insurance policies issued through various insurance programs.

Agency Response: The user guide will provide guidance to insurers with respect to how this type of data can be submitted to the vendor so that the vendor can carry out the program.

§5.604(c): A commenter recommended removing coverage dates, or limiting coverage dates to the current policy term.

Agency Response: The Department declines to make a change. Coverage date information will be useful in establishing the accuracy of the system, particularly with respect to any lag in reporting. As for the scope of coverage dates, the information that is requested is for the current policy term.

§5.605: Some commenters questioned how the program would account for vehicles insured in Texas, but not registered in Texas, or conversely registered in Texas, but not insured in Texas.

Agency Response: Vehicles insured in Texas, but not registered in Texas, will have to be dealt with through the error correction process and may require information from the owner to clarify this situation. Vehicles registered in Texas, but not insured in Texas, will be identified during the ongoing verification process and handled accordingly by the vendor.

§5.605 and §5.606(f)(5): A commenter requested that database insurers have access to TxDOT and DPS data containing registered vehicles and their vehicle identification numbers (VIN) as part of the database error correction process.

Agency Response: The Department declines to make this a part of the database program. Some TxDOT information will be available to web services insurers to allow them to perform data cleaning and matching functions that are necessary for compliance with the rule. It is not clear why an insurer would need to duplicate the efforts of the vendor in the database system and, as such, delivery of TxDOT data is not part of the database system. However, as DPS data will not be part of the web services system data clean-up process, the Department has also changed proposed §5.606(f)(5) as adopted to remove the reference to DPS data.

§5.605(b): Many commenters argued that the 98 percent match rate is unobtainable and unreasonable at the onset of the program. They claimed that the highest required rate in other states is 92 percent and that the industry average is 75 - 80 percent.

Agency Response: The Department believes that a 98 percent match rate is obtainable due to the matching criteria and methods; however, the Department will postpone the 98 percent match rate requirement until January 1, 2010. Alternatively, an interim 95 percent rate will be required beginning January 1, 2008. Insurers will be responsible for providing accurate data to ensure that their insurance policy records match to a registered vehicle. In addition to cleaning up the data, the initial error correction and database clean-up procedure should also identify and eliminate those vehicles and/or policies that are not required to be included as a match for purposes of the program. Additionally, matching is not based solely on directly matching each piece of data for an entire insurance policy record. Rather, the program will rely on both direct matches and partial matches. For the database system, the vendor will develop and use cascading data matching algorithms that are designed to analyze possible, but not exact, matches and determine if it is more likely than not that a vehicle matches with the insurance policy in question. Under the web services program, the web services insurer is required to develop a similar algorithm, but may be able to refine the algorithm more to fit its particular set of data. The additional information required by the program is designed to increase match rates. The Department notes that Utah, Colorado, and New Mexico are currently close to meeting a 98 percent match rate. However, the Department recognizes that the optimal match rate may need to be achieved over a period of time and, based on comments, has changed proposed §5.605(b) and §5.606(g) as adopted to require a match rate of 95 percent by January 1, 2008, with an increase to a 98 percent match rate by January 1, 2010.

§5.605(b): A commenter requested an exception to the 98 percent match rate for insurers that write non-standard automobiles and cannot perform VIN validation because these vehicle's VINs do not conform to Federal standards. Another commenter was concerned that specialty products having a non-standard VIN may result in a high error rate.

Agency Response: The Department does not believe an exemption is necessary for non-standard VIN because all data is not required to match to achieve a cascading data match and VINs are not an exclusive match criteria. As such, since the vendor will be using multiple fields to match data through a cascading match, a non-standard VIN should not present a matching problem.

§5.605(b): A commenter suggested that the 98 percent match rate is too low.

Agency Response: The Department declines to increase the match rate because the Department is not aware of any state operating a similar insurance verification program currently reporting exceeding a 98 percent match rate.

§§5.605(e), 5.606(f), and 5.607(f): Some commenters were concerned about the potentially significant error correction costs. Other commenters were concerned that the proposal specified the timing, frequency, and manner of the required policyholder error correction communication. Commenters argued that insurers and agents know best how to communicate with customers; that the requirements added an unnecessary expense; and that, historically, such notices had generated limited response in other states.

Agency Response The Department agrees to change the proposed requirements as to the frequency and manner of policyholder error correction notices. The Department is aware that the cost of error correction may indeed be significant, especially at the onset of the program. In consideration of these comments, the Department has modified proposed §§5.605(e), 5.606(f), and 5.607(f) as adopted to require only one error notice be sent to the policyholder and to allow that notice to be in a form chosen by the insurer. The proposal cost note recognized that, based on experience in other states, initial error rates of 20 percent could reasonably be expected. Such error rates could result in thousands to hundreds of thousands of error notices and additional communications between insurers and their customers for each insurer. To reduce matching errors and their associated costs, the program requires several types of insurer data for use in cascading matching algorithms to increase the match rate. It should also be noted that the adopted sections do not require the insurer to take additional efforts to correct data beyond communicating errors to their policyholders and updating their records when, and if, the policyholder provides the insurer additional information. Therefore, based on comments and the anticipated costs to insurers, the Department has changed proposed §§5.605(e), 5.606(f), and 5.607(f) with respect to the frequency and manner of providing error notices to customers. Under the adopted sections, the insurer will be required to provide a single notice to the insured in a manner of the insurer's choosing. The database insurer will be required to communicate a request to the policyholder to provide confirming or corrected information within 10 calendar days after receiving the error notice from the vendor. The web services insurer will be required to communicate a request to the policyholder to provide confirming or corrected information within 10 calendar days after discovering the error. The form of communication is not specified in the adopted sections, but is left to the insurer's discretion. The Department and vendor may review these notices during the auditing process. The insurer will not be required to provide additional error notices; however, the insurer may provide additional notices both to attempt to boost the insurer's match rate and/or avoid customer inconvenience. Because of the changes in the frequency and manner of the required communications, the Department also made several nonsubstantive grammatical and other editorial changes to proposed §5.605(e) and §5.606(f), as adopted.

§5.605(e): Some commenters argued that the vendor, not the insurers, should be responsible for notifying policyholders and correcting errors. Other commenters argued that policyholder error notices should come from the insurer.

Agency Response: The Department declines to change the requirement that the insurer notify policyholders regarding data errors. The program does not have sufficient funding at this time

for the vendor to perform the policyholder error notification function. Further, the Department is not persuaded that consumers would be more likely to respond to a request for information from an unfamiliar vendor rather than from their own insurance company.

§§5.605(e); 5.606(f); and 5.608(e), (f), and (g): A commenter requested that the Department add to the rule a statement that the vendor will send error notices to an insurer's delegated MGA under adopted §5.609(a).

Agency Response: The Department agrees to make this change in proposed §§5.605(e); 5.606(f); and 5.608(e), (f), and (g) as adopted. Additionally, for clarification purposes, the Department has also included a definition of the term delegated MGA in adopted §5.602(8): a Department licensed managing general agent operating on behalf of an insurer through a delegation contract with that insurer under §5.609(a) of this subchapter (relating to Delegation and New Insurers). The Department has changed §§5.605(e); 5.606(f); and 5.608(e), (f), and (g) to clarify that error correction and TxDOT file data information will be sent to both the insurer and its designated MGA. The Department, however, has not added the term delegated MGA to every reference to insurer in adopted §§5.601 - 5.611, because adopted §5.609(a) clearly states that the delegated MGA is jointly and severally responsible for meeting the insurer's program requirements. As such, if the requirement applies to the insurer, then the requirement applies to the delegated MGA. However, the comment indicates that this relationship was not definitive in the proposal. Therefore, to further clarify that the delegated MGA will stand in the place of the insurer with respect to the requirements of §§5.601 - 5.611, the Department has added to the first sentence of proposed §5.609(a) as adopted the statement that, to the extent an insurer has contractually delegated any requirement of §§5.601 - 5.611 to an MGA, the MGA shall be deemed an insurer for the purposes of §§5.601 - 5.611.

§5.606: Some commenters recommended deleting §5.606 because they were not aware of any insurer intending to use the web services program.

Agency Response: The Department declines to make the suggested change. This section sets forth a procedure for establishing the web services program on a timely basis. The Department believes the web services system is a workable solution and wants to leave this option available for those insurers who may choose to implement this option as a method of program compliance.

§5.606 - §5.608: Several commenters felt the web services system was an inverse database system. Another commenter argued that the described web services program is too cumbersome and virtually impossible as an option.

Agency Response: The Department disagrees that the web services system is either a cumbersome or an impossible option. The systems are similar and they do rely on stored matched data. The web services system incorporates many of the same requirements as are placed on the program vendor through its contract, and the Department considers the web services system to be a workable solution. Additionally, both systems are designed to fit the needs of the users and respond to the same user inputs and produce the same user responses. The web services system will also allow an insurer to develop a separate matching algorithm that may better fit the web services insurer's data.

§5.606 - §5.608: A commenter argues that the requirement for an insurer to begin compliance with the database system within 30 calendar days after discontinuing the web services system is a bar to attempting the web services system.

Agency Response: The Department disagrees. A web services insurer would essentially need to meet the same requirements as a new insurer under adopted §5.609. As such, an insurer discontinuing the web services system before June 1, 2007, would not need to begin reporting data before June 30, 2007. After June 1, 2007, the requirement would be 30 days. However, both systems require similar information and also that the information undergo a data clean-up process. As such, unless the web services insurer discontinues participation early in the process, some of these processes should have already been initiated, thus reducing the time required to meet program requirements.

§§5.606 - 5.608 and 5.611: Several commenters argued for replacing the web services system with the IICMVA web services program model. However, two commenters conceded that the IICMVA model is not ready for implementation in Texas at this time and proposed that the pilot program would help get this model ready for Texas. Other commenters, however, argued against the IICMVA web services program model.

Agency Response: The Department declines to make this change. The adopted web services program is designed to function within the existing framework of data maintained by TxDOT and DPS equipment, as well as address DPS safety concerns. As in the proposal, adopted §5.611 also provides for voluntary participation in a test program that would use insurer provided key-data to provide verification of financial responsibility under the Texas Motor Vehicle Safety Responsibility Act. The Department, however, has amended proposed §5.611 so that it now indicates a path by which the test program can be tested and, if accepted by the implementing agencies, approved for use in Texas.

§5.609(a): A commenter asked if the rule would allow for delegation to multiple MGAs.

Agency Response: The Department has made a change to proposed §5.609(a) to clarify that this is allowed. The Department notes that it is the responsibility of the insurer and MGAs to clearly delineate insurance policy program responsibilities in a delegation agreement or potentially become jointly and severally responsible for compliance on all of the insurer's policies.

§5.609(b) and (c): A commenter requested that newly appointed MGAs be treated as new insurers so that data they are responsible for submitting would not be due for 30 days.

Agency Response: The Department agrees with this change. To effect this change, the Department has added §5.609(d) to the adopted text to state that an MGA has the same reporting options as an insurer and that an MGA subsequently contracting with an insurer must begin reporting in the same manner as an insurer under adopted §5.609(b) and (c). The Department has also made a nonsubstantive correction to the reference to the title of §5.606 in proposed §5.609(b) as adopted.

§5.610(a): A commenter argued that the penalty provisions are inappropriately severe and requested that a willful or knowing requirement be added to proposed §5.610.

Agency Response: The Department disagrees that the penalty provisions are overly harsh. The penalty provisions are established by statute. The standard for enforcement under each statute is established by that particular statute and cannot be

modified by rule. However, to clarify how the provisions will operate procedurally, the Department has changed proposed §5.610(a) as adopted to read the commissioner may after opportunity for notice and hearing, discipline an insurer or license holder under the Insurance Code Chapters 82, 83, and 84, and any other applicable law if the commissioner determines the insurer or license holder is in violation of, or has failed to comply, with any of the requirements of §§5.601 - 5.611.

§5.611: Some commenters were concerned that the proposal did not describe the pilot test program detail. Some commenters argued for the IICMVA model web services program to be substituted for the pilot test program.

Agency Response: The Department declines to make this change. Although reportedly adopted in Wyoming and being tested in Florida, the Department is not aware that the IICMVA model web services program has been fully demonstrated or implemented in any state. To allow for change and innovation, adopted §5.611 is not limited to the existing IICMVA model web services program and the pilot test program has not been further defined because such definition could limit the development of the pilot test program.

§5.611: Commenters voiced concern that the pilot test program might be bound by the existing requirements of proposed §§5.606 - 5.608.

Agency Response: The Department agrees and has changed §5.611 to clarify that the test program shall not be bound by adopted §§5.606 - 5.608. However, neither the industry nor the implementing agencies are prohibited from placing the same or similar requirements on the test program for the purposes of obtaining implementing agency approval.

§5.611: A commenter argued that the language for the pilot test be modified to include wording that the pilot program could become a means of compliance if proven viable.

Agency Response: Adopted §5.611 has been revised to create a structure under which the test program can be tested, approved by the implementing agencies, and implemented as a means of program compliance.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE SECTIONS.

For with changes: Alliance of Insurance Agents of Texas, Inc.; American Southwest Insurance Managers; Bristol West Insurance Group; GAINSCO Auto Insurance; Farmers Insurance Group; Foremost Insurance Group; Insurance Industry Committee on Motor Vehicle Administration; Liberty Mutual Group; NLETS; Office of Public Insurance Counsel; Old American County Mutual; Progressive County Mutual Insurance Company; Property Casualty Insurers Association of America; State Farm Insurance Companies; Texas County Mutual Association; Texas Farm Bureau Insurance Companies; Texas State Low Cost Insurance; and USAA.

Against: American Insurance Association, Association of Fire and Casualty Companies of Texas, and Insurance Council of Texas.

The new sections are adopted under Transportation Code, Chapter 601, Subchapter N and §502.1715 and Insurance Code §§36.001 and 36.201. Transportation Code §601.451(a) requires the Department, in consultation with the Texas Department of Public Safety, the Texas Department of Transportation, and the Texas Department of Information Resources (the implementing agencies), to establish a program for verification of whether owners of motor vehicles have established financial responsibility as required by law and meeting the requirements of that subsection. Section 601.452(b) authorizes the implementing agencies to jointly adopt rules to administer Chapter 601, Subchapter N. Transportation Code §601.453(c) provides that the implementing agencies shall convene a working group to facilitate the implementation of the program and coordinate a testing phase and necessary changes identified in the testing phase. Transportation Code §601.453 requires the Department in consultation with the other implementing agencies, under a competitive bidding procedure, to select a vendor to develop, implement, operate, and maintain the program. Transportation Code §601.454 requires each insurance company providing motor vehicle liability insurance policies in this state to provide necessary information for those policies to allow the vendor to carry out Transportation Code, Chapter 601, Subchapter N, subject to the vendor's contract with the implementing agencies and rules adopted under this subchapter; provides that the vendor is entitled only to information that is determined to be necessary by the implementing agencies for the vendor to carry out the program; limits the information to the information available at that time from the insurance company; and makes the information obtained under Transportation Code, Chapter 601, Subchapter N, confidential. Transportation Code §502.1715(c) authorizes, subject to appropriation, the implementing agencies to use funds deposited to the credit of the state highway fund under that section to implement Transportation Code, Chapter 601, Subchapter N. Transportation Code §502.1715(d) authorizes the implementing agencies to jointly adopt rules to administer Transportation Code §502.1715. Insurance Code §36.201 provides that an action of the Commissioner of Insurance, including a decision, order, rate, rule, form, or administrative or other ruling of the Commissioner, is subject to judicial review. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§5.602. Definitions.

The following words and terms when used in this division shall have the following meanings unless the context clearly indicates otherwise.

(1) Back-up data--Data simultaneously copied, i.e. mirrored, to another physical location and storage device at set intervals.

(2) Cascading data matching--A data matching algorithm that uses multiple data fields to increase the accuracy and/or frequency of matched data. Cascading data matching may not result in a 100 percent match of all fields, but a match may be made with a reasonable degree of accuracy.

(3) Cold site--A secure location where equipment would be shipped following a disaster.

(4) Critical time--The time in days per week and/or hours per day when the system is expected to be available and fully functional.

(5) Data--Information of any type.

(6) Database insurer--An insurer that elects to report insurance policy records directly to the vendor using the database program.

(7) Database program--A vendor maintained database, derived from insurance policy records submitted by insurers and vehicle and driver information maintained by TxDOT and DPS, created for the

purpose of insurance verification during the event based and ongoing verification processes.

(8) Delegated MGA--A department licensed managing general agent operating on behalf of an insurer through a delegation contract with that insurer under §5.609(a) of this subchapter (relating to Delegation and New Insurers).

(9) Department--Texas Department of Insurance.

(10) DPS--Texas Department of Public Safety.

(11) Event based process--A data transmission process using the database and/or web services programs to promptly verify insurance coverage.

(12) Hot site--A secure location with data processing equipment already in place that can be activated in case of a disaster.

(13) Insurer--An insurance company or insurance carrier that writes motor vehicle insurance in this state, including stock companies, mutual companies, Lloyd's plans, county mutuals, farm mutuals, surplus lines carriers, and reciprocal exchanges.

(14) Listed Driver--A driver listed on a personal automobile insurance policy, not including a named excluded driver to whom no coverage is offered under the insurance policy.

(15) Match Rate--The percentage of insurance policy records matched to vehicles, divided by the total number of all insurance policy records.

(16) Ongoing verification process--A data transmission process using the database and/or web services programs to verify financial responsibility of owners of motor vehicles on a continuing basis.

(17) Personal automobile insurance policy--A motor vehicle insurance policy providing the liability coverage required by the Texas Motor Vehicle Safety Responsibility Act in connection with the ownership, maintenance, or use of a private passenger, utility, or miscellaneous type motor vehicle, including a motor home, trailer, or recreational vehicle, that is owned or leased by an individual or individuals and not primarily used for the delivery of goods, materials, or services, other than for use in farm or ranch operations, including non-owner policies and mileage based policies.

(18) Program--Financial Responsibility Verification Program, including both the database program and the web services program.

(19) Recovery Point Objective (RPO)--The point in time at which the data processing services supporting the financial responsibility verification program are expected to be available following an outage.

(20) Recovery Time Objective (RTO)--The number of hours between the loss of data processing services until full services are expected to be available again.

(21) TxDOT--Texas Department of Transportation.

(22) User--A person that verifies insurance information through the Financial Responsibility Verification Program.

(23) User Guide--Financial Responsibility Verification Program Guide and User Manual.

(24) Vendor--Agent selected to develop, implement, operate, and maintain the Financial Responsibility Verification Program.

(25) VIN--Vehicle identification number.

(26) Web services insurer--An insurer that elects to provide insurance policy record data to the vendor using a web services program.

(27) Web services program--A program developed and maintained by a participating insurer that complies with §§5.606, 5.607, and 5.608 of this subchapter (relating to Requirements for Insurers Using the Web Services Program, Web Services Program System Requirements and Web Services Program Performance Requirements).

§5.603. Financial Responsibility Verification Program Guide and User Manual.

(a) The user guide established in accordance with SECTION 4 of SB 1670 (Acts 2005, 79th Leg., R.S., chap. 892, SB 1670 sec. 4) will provide technical guidance to insurers on how to comply with the requirements and procedures specified in §§5.601 - 5.611. The user guide specifications are subject to change based on technology or program experience. Such changes to the user guide shall not affect the substantive requirements of this division.

(b) The user guide may be obtained from the Data Services Division of the Texas Department of Insurance, Mail Code 105-5D, P.O. Box 149104, Austin, Texas 78714 or the department website at www.tdi.state.tx.us.

§5.604. Reporting Requirements for Insurers Using the Database Program.

(a) Unless an insurer provides the department notice of its election to be a web services insurer under §5.606(b) of this subchapter (relating to Requirements for Insurers Using the Web Services Program), each insurer shall participate in the database program for the event based and ongoing verification processes.

(b) Except as required in §5.606 and §5.609 of this subchapter (relating to Delegation and New Insurers) each database insurer must begin compliance with this section and §5.605 of this subchapter (relating to Data Error Correction Requirements for Insurers Using the Database Program) beginning not earlier than January 1, 2007 and not later than June 30, 2007.

(c) Each database insurer shall submit weekly data on all of the insurer's personal automobile insurance policies in force in Texas. The data shall specify the following for each policy, policyholder, listed driver, and vehicle covered, and as necessary each policy, policyholder, listed driver, and vehicle combination:

(1) company identifying information;

(2) policy identifying information, including applicable coverage dates;

(3) vehicle identifying information;

(4) policyholder and/or listed driver identifying information; and

(5) an insurer defined data field for insurer use.

(d) The weekly submission date and time shall be specified by the vendor and shall be approximately seven calendar days apart.

(e) The department and vendor will develop specific database program reporting procedures for insurers with less than 1,000 issued and outstanding personal automobile insurance policies.

§5.605. Data Error Correction Requirements for Insurers Using the Database Program.

(a) Each database insurer shall investigate and correct data errors identified by the vendor as required in subsection (e) of this section.

(b) Each database insurer shall provide sufficient and accurate data to meet and maintain a 95 percent match rate beginning January 1, 2008 and a 98 percent match rate beginning January 1, 2010.

(c) The database insurer must be able to receive notice of data errors in the same manner that data is transmitted to the vendor, or a method that is mutually agreed upon by the vendor and the insurer.

(d) Insurers must re-submit corrected data.

(e) The database insurer, and/or its delegated MGA, shall receive notice of the following data errors from the vendor, and shall comply with the following data correction procedures:

(1) for data file format errors, the database insurer will have three business days to correct errors and resubmit the entire data file to the vendor; and

(2) for insurance policy records not matched to a registered vehicle, the vendor will send the insurer, and/or its delegated MGA, non-match notices:

(A) upon receipt of the first non-match notice from the vendor, including notice for errors beyond the database insurer's authority to correct, the insurer must:

(i) within 10 calendar days of receipt of the non-match notice, request from the policyholder confirmation of the insurer's existing information or corrected information;

(ii) request that the policyholder respond within 14 calendar days; however, the insurer shall not be subject to, nor shall the insurer subject the policyholder to, any penalty for the policyholder's non-compliance; and

(iii) send any correction(s) received from the policyholder to the vendor within the next two regularly scheduled data transmissions; and

(B) upon receipt of the second notice of the non-match error from the vendor, the insurer may, but is not required to, provide additional notices to the policyholder concerning that non-match error.

(f) Each database insurer must maintain a record of its data correction activities and determinations for review by the vendor and the department for four years. The records may be stored electronically.

(g) Each database insurer must assist the vendor in auditing the database program, including responding to vendor requests for confirmation of policy records matched to a registered vehicle using cascading data matching.

§5.606. Requirements for Insurers Using the Web Services Program.

(a) Each web services insurer must meet the requirements of the web services program through both the event based process and the ongoing verification process.

(b) Each insurer electing to use the web services program for the event based and ongoing verification processes must provide written notice to the department. Written notice must name the insurer or each insurer in a group, be signed by an officer of the company or group, and be submitted to the Financial Responsibility Verification Program Coordinator, Property and Casualty Program, Mail Code 105-5C, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104, not later than 10 business days after the date this section is effective. All submissions to the department under this division must be made to the Financial Responsibility Verification Program Coordinator (coordinator) unless otherwise specified.

(c) Not later than 30 calendar days after the insurer notifies the department of its election to become a web services insurer, the insurer must submit to the coordinator for approval written documentation and specifications addressing §5.607(a) - (e) of this subchapter (relating to Web Services Program System Requirements). Written documentation and specifications must include a detailed project plan including a timeline, a full description of the proposed web services solution, and other information necessary to establish compliance with the web services program requirements. If it is determined as specified in subsection (i) of this section that the insurer's submission does not propose a solution that will meet all system and performance requirements, the insurer must begin program development to meet requirements of the database program as detailed in §5.604 and §5.605 of this subchapter (relating to Reporting Requirements for Insurers Using the Database Program and Data Error Correction Requirements for Insurers Using the Database Program).

(d) If an insurer's web services documentation and specifications have been determined to meet the system requirements of subsection (c) of this section and the insurer has obtained the appropriate department approval, the insurer must within 90 calendar days after receiving written notice of department approval as required in subsection (c) of this section submit to the coordinator for approval documentation showing that the web services insurer is capable of meeting all system and performance requirements detailed in §5.607 and §5.608 of this subchapter (relating to Web Services Program Performance Requirements). Such documentation must include a detailed progress report in compliance with the submitted project plan and timeline, and other information necessary to establish compliance with the web services program requirements. If it is determined as specified in subsection (i) of this section that the insurer's submission does not meet all system and performance requirements, the insurer must begin program development to meet requirements of the database program as detailed in §5.604 and §5.605 of this subchapter.

(e) Each insurer that has met the system and performance requirements of subsection (d) of this section must within 180 calendar days after receiving written notice of department approval as required in subsection (c) of this section submit to the coordinator for approval documentation showing the insurer is able to meet all system and performance requirements detailed in §5.607 and §5.608 of this subchapter. Such documentation shall include testing methodology, testing data sets, testing results, and other information necessary to establish compliance with the web services program requirements. If it is determined as specified in subsection (i) of this section that the insurer's submission does not meet all system and performance requirements, the insurer shall have 30 calendar days to comply with the database program requirements in §5.604 and §5.605 of this subchapter and begin reporting data.

(f) Following department approval as required in subsection (e) of this section, each web services insurer shall begin a data clean-up phase. Required data clean-up procedures include:

(1) the web services insurer, and/or its delegated MGA, will receive a file of registered vehicles from TxDOT and must match insurance policy records to the file of registered vehicles;

(2) insurance policy records that cannot be matched to a registered vehicle will be required to undergo a data correction process, including for errors beyond the web services insurer's authority to correct;

(3) as necessary, the web services insurer must contact the policyholder to confirm or correct information as follows:

(A) within 10 calendar days of discovering the information indicated to be in error, request from the policyholder confirmation of the insurer's existing information or corrected information;

(B) request that the policyholder respond within 14 calendar days; however, the insurer shall not be subject to, nor shall the insurer subject the policyholder to, any penalty for the policyholder's non-compliance; and

(C) make any necessary correction within 15 calendar days after receipt of a response from the policyholder;

(4) while not required, the insurer may send additional notices concerning that non-match error to the policyholder if the insurer does not receive a correction response from the policyholder; however, the insurer shall not be subject to, nor shall the insurer subject the policyholder to, any penalty for the policyholder's non-compliance; and

(5) the web services insurer, and/or its delegated MGA, may request a reload of TxDOT data as needed during the data clean-up/correction process.

(g) Each web services insurer must achieve and maintain a 95 percent match rate by January 1, 2008 and a 98 percent match rate by January 1, 2010. The insurer and/or the vendor shall submit information and documentation to the coordinator on request indicating whether the insurer has achieved the required match rate. If it is determined as specified in subsection (i) of this section that the insurer has not met the match rate and all system and performance requirements, the insurer shall have 30 days to comply with the database program requirements in §5.604 and §5.605 of this subchapter and begin reporting data.

(h) Each insurer approved to use the web services program must maintain all web service requirements. The coordinator may request information from the vendor and/or the insurer to confirm that the web services insurer is maintaining all web service requirements. If it is determined as specified in subsection (i) of this section that a web services insurer that has previously met all web services requirements is unable to maintain the system and performance requirements as required in this section and §5.607 and §5.608 of this subchapter the web services insurer shall:

(1) no longer be allowed to operate as a web services insurer; and

(2) have 30 days to comply with the database program requirements in §5.604 and §5.605 of this subchapter and begin reporting data.

(i) The procedure for determining whether an insurer has met the requirements of this section shall be as follows:

(1) In computing any period of time prescribed or allowed by this division, the day of the act, event, or default after which the designated period of time begins to run shall not be included, but the last day of the period so computed shall be included, unless it be a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a legal holiday;

(2) On or before the date specified in subsections (c), (d), or (e) of this section, and as requested by the coordinator under subsections (g) or (h) of this section, the insurer shall submit all specifications, documentation, and other data to the coordinator;

(3) Within 14 calendar days of submission by the insurer, the coordinator shall review the submission and provide written notification to the insurer if the submission is determined to be in compliance or if it fails to meet the requirements;

(4) If the coordinator notifies the insurer that the submission fails to meet the requirements, the insurer may appeal to the commissioner for review of the coordinator's decision by making a written request to the coordinator within 20 calendar days of the date the insurer receives the coordinator's written decision. The written request for review must provide a rebuttal of the coordinator's written decision. If the insurer does not appeal the coordinator's written decision within the 20 calendar day period, the coordinator's written decision shall become final; and

(5) Within 14 calendar days of receiving the rebuttal, the commissioner, or the commissioner's authorized representative, shall make a written determination on the basis of the original submission, the coordinator's written decision, and the insurer's rebuttal.

(j) A decision under subsection (i)(5) of this section may be appealed under Texas Insurance Code §36.201.

(k) An appeal to the commissioner under subsection (i) of this section does not stay or extend the period for compliance with the database program under subsections (c), (d), (e), (g), and (h) of this section.

§5.607. Web Services Program System Requirements.

(a) A web services insurer must design, develop, maintain, and submit specifications for a web services program application capable of verifying the status of a policyholder's insurance information. The program must enable the insurer to receive and respond to the vendor's insurance verification inquiries during the event based process and to process batch inquiries of multiple vehicles during the ongoing verification process.

(b) The web services program transmission format and protocols must be compliant with XML standards as published by the World Wide Web Consortium (W3C).

(c) The insurer's web services program must incorporate basic web service infrastructure standards; select a common XML standard to align with the other web services infrastructure standards; and set forth procedures for agreement between insurers and the vendor to use one set of web services security standards, adhere to SOAP 1.1 standards, and use one set of authentication standards.

(d) The web services insurer must develop and implement an algorithm that matches policy and policyholder data to information provided by the vendor in the query process. The algorithm may also use cascading data matching that may not result in a 100 percent match of all fields, but a match may be made with a reasonable degree of accuracy. The algorithm must match information using:

(1) the VIN, if available, and one additional field; or

(2) at least two data fields provided by the vendor.

(e) Data fields provided by the vendor shall include:

(1) VIN;

(2) registered owner's and/or listed driver's license number;

(3) vehicle make, model, and year;

(4) registered owner's and/or listed driver's name;

(5) registered owner's and/or listed driver's address;

(6) registered owner's and/or listed driver's date of birth; and

(7) specific policy coverage date, as applicable.

(f) For information found to be in error, each web services insurer continuing in the web services program must, as necessary, contact its policyholders to confirm or correct information using the data clean-up procedures outlined in §5.606 of this subchapter (relating to Requirements for Insurers Using the Web Services Program).

(g) Each web services insurer must provide a disaster recovery plan that meets the following requirements:

(1) recovery time objective within two hours during the critical time period that is defined as seven days per week, 24 hours per day per program; a single data center solution is acceptable;

(2) recovery point objective consisting of the last data load;

(3) a hot site or cold site capable of meeting the recovery time objective; and

(4) back-up data consisting of weekly backup following the data load.

(h) Each web services insurer must provide up-time and availability of 99.8 percent for the event based process. This requirement excludes scheduled and planned outages for upgrades or maintenance; outages requested by the department; and outages resulting from the failure of any systems or components that are not owned, controlled, or contracted by the vendor or web services insurer, unless the cause of the failure can be shown to have been a result of the web services insurer's negligence or malfeasance.

(i) Each web services insurer must comply with all procedures relating to data confidentiality and security standards, including:

(1) signing any documents necessary to enable the vendor to comply with the disclosure restrictions and privacy protections required by:

(A) the department;

(B) TxDOT;

(C) DPS;

(D) the Texas Department of Information Resources; and/or

(E) the Texas Law Enforcement Telecommunications System;

(2) adhering to the confidentiality provisions of Transportation Code, Chapter 601, Subchapter N, including compliance with unique identifiers and passwords for user access to the program and entering into legal trading partner agreements with the vendor to exchange data via the web services program;

(3) adhering to the provisions of Texas Administrative Code Title 1, Part 10, Chapter 202 (relating to Information Security Standards); and

(4) adhering to any other procedures set forth to ensure that the program is protected against unauthorized access, disclosure, modification or destruction, whether accidental or deliberate, as well as to assure the availability, integrity, utility, authenticity, and confidentiality of information.

§5.608. Web Services Program Performance Requirements.

(a) The web services insurer must accept and respond to insurance verification inquiries from the vendor.

(b) The web services insurer must respond to inquiries in no more than 1.75 seconds, of which 0.25 seconds is allotted for transmission from vendor to insurer, and 0.25 seconds is allotted for transmission from insurer to vendor.

(c) The web services insurer must respond to the vendor with either an affirmative response and applicable information, or with a negative response as appropriate.

(d) Policy and policyholder data that the web services insurer must return with an affirmative response includes, to the extent that the information is at that time available from the insurer:

(1) company identifying information;

(2) policy identifying information, including applicable coverage dates;

(3) vehicle identifying information;

(4) policyholder's and/or listed driver's identifying information; and

(5) an insurer defined data field for insurer use.

(e) The web services insurer, and/or its delegated MGA, shall receive notification from the vendor of:

(1) any problems with the transmission of the inquiry response; and

(2) multiple affirmative responses to a verification request.

(f) On a monthly basis for the purpose of vehicle registration renewals, the vendor must, as required by TxDOT, submit to each web services insurer, and/or its delegated MGA, a file of registered vehicles approaching the registration renewal date. The web services insurer must mark as "insured" each registered vehicle for which an active insurance policy record is on file and return that file to the vendor within three days of receipt of the registration renewal file.

(g) Beginning on January 1, 2008, on a weekly basis for the purpose of ongoing verification, the vendor shall submit to each web services insurer, and/or its delegated MGA, a file of registered vehicles for which the insurer must:

(1) mark as "insured" each registered vehicle for which an active insurance policy record is on file and return that file to the vendor within three days of receipt of the registered vehicle file; and

(2) return to the vendor a file of all insurance policy records that could not be matched to a registered vehicle.

(h) Each web services insurer must maintain necessary information to assist the department in auditing the vendor's monthly and annual reports, including archiving:

(1) computer data files at least semi-annually for auditing purposes in an electronic format compatible with the department's computer systems that shall include:

(A) time a query is received to the hundredth of a second;

(B) time a query is responded to, to the hundredth of a second;

(C) query contents;

(D) query response; and

(2) program audit trails, document control, program access control and software change control.

(i) Each web services insurer must maintain its archived data for a minimum of four years.

(j) Each web services insurer must develop and implement maintenance plans that comply with the following:

(1) maintenance schedule as outlined by the department (with insurer and vendor input) and that may include modifications of the web services program after delivery to correct faults, improve

performance, add other attributes, or adapt to a changed technical environment;

(2) coordination of all maintenance with the department that includes obtaining written approvals for the maintenance;

(3) a process for approval of exceptional or emergency maintenance; and

(4) provisions for corrective maintenance, adaptive maintenance, and perfective maintenance.

§5.609. Delegation and New Insurers.

(a) An insurer may delegate by written contract the functions that the insurer is required to perform under the program to one or more department licensed managing general agents (MGA), and to the extent an insurer has contractually delegated any requirement of §§5.601 - 5.611 to an MGA, the MGA shall be deemed an insurer for the purposes of §§5.601 - 5.611. A copy of the delegation agreement must be submitted to the department's Financial Responsibility Verification Program Coordinator and the vendor. Under such delegation, both the MGA and the insurer shall be jointly and severally responsible for full compliance with this program and jointly and severally subject to disciplinary actions from the department for failure to meet program requirements.

(b) An insurer or delegated MGA that commences writing personal automobile insurance in the Texas market more than 10 business days after the effective date of §5.606 of this subchapter (relating to Requirements for Insurers Using the Web Services Program), but before June 1, 2007, shall comply with the database program as detailed in §5.604 and §5.605 of this subchapter (relating to Reporting Requirements for Insurers Using the Database Program and Data Error Correction Requirements for Insurers Using the Database Program) and must begin reporting data on or before June 30, 2007.

(c) An insurer that commences writing personal automobile insurance in the Texas market on or after June 1, 2007 shall have 30 calendar days to comply with the database program requirements in §5.604 and §5.605 of this subchapter and begin reporting data.

(d) An MGA that has been contracted to act on behalf of an insurer under subsection (a) of this section has the same reporting options as an insurer. An MGA that contracts to act on behalf of an insurer under subsection (a) of this section more than 10 business days after the effective date of §5.606 of this subchapter must comply with the database program requirements in §5.604 and §5.605 of this subchapter and begin reporting data as specified for an insurer in subsections (b) and (c) of this section.

§5.610. Penalties.

(a) The commissioner may after opportunity for notice and hearing, discipline an insurer or license holder under the Insurance Code Chapters 82, 83, and 84, and any other applicable law if the commissioner determines the insurer or license holder is in violation of, or has failed to comply, with any of the requirements of §§5.601 - 5.611.

(b) In accordance with Transportation Code §601.454, a person commits an offense if the person knowingly uses data obtained under Chapter 601, Subchapter N, for any purpose not authorized under Subchapter N. An offense under §601.454(d) is a Class B misdemeanor.

§5.611. Participation in Voluntary Testing Transmission System.

(a) An insurer or group of insurers (participating insurers) may test a transmission system based on the transmission of insurer provided key-data to provide verification of compliance with the Texas Motor Vehicle Safety Responsibility Act.

(b) Further specifics for the test program will be developed by the department, TxDOT, DPS, and the Texas Department of Information Resources (implementing agencies), the participating insurers, and the vendor.

(c) When the participating insurers demonstrate a working test program for the event based process, the ongoing verification process, or both, to the satisfaction of the implementing agencies, the accepted test program will become an alternate means of compliance with the Financial Responsibility Verification Program to the extent it has been accepted for use by the implementing agencies to fulfill the event based process and/or ongoing verification process of the program.

(d) Insurers must comply with either the database system or the web services system until such date as the department and/or the other implementing agencies adopt rules detailing technical, performance, and user requirements for use with the accepted test program.

(e) Insurers are responsible for funding all equipment and technical resources necessary for the development, testing, and deployment of the test program and the accepted test program, except for those funds the implementing agencies have authorized the vendor to spend in connection with the test program.

(f) Sections 5.606, 5.607, and 5.608 of this subchapter (relating to Requirements for Insurers Using the Web Services Program, Web Services Program System Requirements, and Web Services Program Performance Requirements) shall not apply to the test program. This does not limit the insurers or the implementing agencies from requiring the same or similar technical, performance, and user requirements described in those sections as may be necessary to create a functioning system and obtain implementing agency approval.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on November 15, 2006.

TRD-200606237
Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Effective date: December 5, 2006
Proposal publication date: September 8, 2006
For further information, please call: (512) 463-6327

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 356. GROUNDWATER MANAGEMENT

SUBCHAPTER B. DESIGNATION OF GROUNDWATER MANAGEMENT AREAS

31 TAC §356.23

The Texas Water Development Board (the board) adopts amendments to 31 TAC §356.23 concerning Groundwater Management without changes to the proposed text as published in the October 6, 2006, issue of the *Texas Register* (31 TexReg 8337) and

will not be republished. This section designates and delineates groundwater management areas (GMAs) as required by statute.

The board adopts amendments to §356.23 to correct an error in the boundary lines for the previously designated and delineated groundwater management areas. Additionally, a software update has resulted in seven digital files instead of three that made up the original data set. The seven updated digital files collectively constituting a data set delineating the corrected groundwater management area boundary lines are adopted by reference. A CD-ROM containing the corrected data is located in the offices of the board and is on file with the Secretary of State, Texas Register. The corrected CD-ROM contains all of the geographic information system data used to create the boundaries as well as software and instructions on how to locate a specific area by coordinates or other means on a digital map. The same information can also be found on the board's website at http://www.twdb.state.tx.us.

One comment on the proposed amendments was received from Mr. Jason Hill, Kemp Smith LLP. Mr. Hill commented that he was unable to locate the digital files on the Board's website as referenced in the proposed amendments.

Response: Board staff advised Mr. Hill that the digital files identifying the corrected boundary lines would be made available on the Board's website when the rule amendment becomes effective. Board staff also provided Mr. Hill with hard copies of maps showing the existing incorrectly identified boundary line and the boundary line as will be correctly identified upon the effective date of this rule amendment.

The amendments are adopted under the authority of the Texas Water Code, Chapter 6, §6.101 which provides the board with the authority to adopt rules necessary to carry out the powers and duties in the Water Code and other laws of the State, as well as under the authority of Texas Water Code, Chapter 35, §35.004 which provides that the Texas Water Development Board shall designate groundwater management areas covering all major and minor aquifers in the State.

The statutory provisions affected by the amendments are Texas Water Code, Chapter 35.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200606227
Wendall Corrigan Braniff
General Counsel
Texas Water Development Board
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For further information, please call: (512) 475-2052

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CHAPTER 365. INVESTMENT RULES
SUBCHAPTER B. INVESTMENT PROCEDURES

31 TAC §365.13

The Texas Water Development Board (board) adopts amendments to 31 TAC §365.13, concerning Investment Rules without changes to the proposed text as published in the October 6, 2006, issue of the *Texas Register* (31 TexReg 8337) and will not be republished. Amendments to this section are adopted to clarify the authorized investment of funds in the board's portfolio. This rulemaking has been undertaken as a result of the board's annual review of its investment policy and strategies as required by Government Code §2256.005, and has been filed with the *Texas Register* concurrently with the board's final action on rule review to its rules in 31 TAC Chapter 365, as required by Government Code §2001.039.

The amendment of §365.13(a)(5) clarifies that the board is authorized to invest in the Texas Treasury Safekeeping Trust Company's (TTSTC's) pooled funds of state agencies. Section 365.13(a)(5) currently lists only the Texas State Treasury as the location of pooled funds in which the board is authorized to invest. However, the board has selected the TTSTC to manage the Colonia Plumbing Loan Program Fund, the State Water Pollution Control Revolving Fund, and the Safe Drinking Water Revolving Fund, all three of which are required to be held outside the Texas State Treasury under Texas Water Code §§15.732, 15.603 and 15.6041. The TTSTC is allowed to invest those funds in pooled funds of state agencies, pursuant to the authority found in Government Code §404.102.

The amendment of §365.13(a) adds new paragraph (8) to include repurchase agreements and reverse repurchase agreements in the list of authorized investments, in order to make this rule clear that the board's investment policy and strategies allow it to invest in these securities. The board currently has the authority to invest in repurchase agreements and reverse repurchase agreements under Government Code §2256.011. Although §365.13 does not currently list repurchase agreements and reverse repurchase agreements specifically, these investments fall under the category of investments in obligations of the U.S. or U.S. government agencies, in §365.13(a)(1). The amendment clarifies that repurchase agreements and reverse repurchase agreements are authorized investments under the board's investment policies.

The amendment of §365.13(b) adds new paragraph (5) to clarify that the board's authorized investments, as set out in its investment policies, includes only those items listed in §365.13(a). Currently, §365.13(a) lists authorized investments and §365.13(b) lists unauthorized investments. However, there are investments authorized under the Public Funds Investment Act (Government Code, Chapter 2256) that are not addressed in either §365.13(a) or (b). By adding new §365.13(b)(5), the board clarifies that any investment that is not listed in §365.13(a) is not an authorized investment under the board's investment policy.

There were no comments received on the amendments.

The amendments are adopted under the authority of the Texas Water Code §6.101, which provides the Texas Water Development Board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State, and the Texas Government Code §2256.005, which requires the Texas Water Development Board to adopt, by rule, a written investment policy regarding the investment of its funds.

The amendments implement Texas Government Code Chapter 2256.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Wendall Corrigan Braniff
General Counsel
Texas Water Development Board
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For further information, please call: (512) 475-2052

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TITLE 43. TRANSPORTATION

PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

CHAPTER 9. CONTRACT MANAGEMENT

SUBCHAPTER A. GENERAL

The Texas Department of Transportation (department) adopts the repeal of §9.2, contract claim procedure, and simultaneously adopts new §9.2, contract claim procedure and §9.6, contract claim procedure for comprehensive development agreement. The repeal of §9.2 and new §9.2 and §9.6 are adopted without changes to the proposed text as published in the September 8, 2006, issue of the *Texas Register* (31 TexReg 7300) and will not be republished.

EXPLANATION OF ADOPTED REPEAL AND NEW SECTIONS

The repeal of §9.2 and simultaneous adoption of new §9.2 implement Transportation Code, §201.112 concerning contract claims. The new section is organized so that the procedures for filing a contract claim are in chronological order. This is intended to make the rule easier to use.

The section also includes several new provisions. Section 9.2(c) concerns contract claims under a comprehensive development agreement (CDA). The new provision recognizes new §9.6 and that the CDA may provide the procedure for resolving a claim under the CDA. The explanation of new §9.6 later in this preamble describes the new procedure authorized for a contract claim under a CDA.

New §9.2(g)(2)(A) adds a provision concerning the deadline for filing a claim. The repealed rule required that a claim be filed no later than one year after the department issues acceptance of the project that is the subject of the contract. The new rule also specifies that a claim must be filed no later than one year after the department issues notice to the contractor that it is in default, or the department terminates the contract. The department believes the addition of this deadline is reasonable. A contractor will be able to determine whether it has a claim within one year after the contractor's work on the contract ends because of default or termination. A contractor's opportunity to file a claim should not be extended beyond one year simply because the contractor's surety or a different contractor continues to work under the contract.

The department is concerned that upon the effective date of the new rule, it will be unclear whether the new deadline to file a claim will apply to a contract under which the deadline under the old rule had not yet passed. The department intends that the deadline to file a claim is the earlier of one year after the effective date of the new rule, or one year after the department issues final acceptance of the project that is the subject of the contract.

Section 9.2(g)(2)(C) and (D) adds a requirement that a prime contractor certify the accuracy of a claim. The provisions are modeled after the federal contract dispute procedure found at 41 USC §605(c) and 48 CFR §33.207. The purpose is to require the person submitting a claim on behalf of a prime contractor to review the claim and supporting documentation to ensure its accuracy and veracity.

Section 9.2(g)(3)(D)(i) and (iii) changes the procedure related to the contract claim committee's (committee) decision and the claimant's acceptance of the decision or failure to respond. The new rule does not require Texas Transportation Commission (commission) approval of the settled claim. The department eliminated this requirement because it is not required in Transportation Code, §201.112. However, the executive director may request the commission approve the settlement. The committee will continue to give notice to the commission and executive director of a settled claim.

Section 9.2(h) adds a provision that a claim against the department shall be forfeited to the department by any person who corruptly practices or attempts to practice any fraud against the department. The provision is modeled after federal law at 28 USC §2514. The purpose is to give the department an appropriate remedy in its own contract claim rule should a claimant present a fraudulent claim. The department does not intend this new subsection to limit other remedies or actions available in law.

Section 9.2(i) concerns the relation of a contract claim proceeding and sanction proceeding concerning the same contract. This new subsection supersedes §9.2(b)(3) in the repealed rule. The new section continues to provide that a contract claim must be considered by the committee before the claim is considered in a contested case. However, §9.2(i) also provides that the processing of a contract claim is a separate proceeding and shall not affect the executive director's assessment of a contract sanction under Subchapter G of this chapter (relating to Contractor Sanctions). If a contested issue arises (e.g. whether the department engineer properly defaulted the contractor) that is common to the two proceedings then the issue shall be resolved in the first proceeding referred for a contested case hearing. The department intends that if there are two simultaneous proceedings that they both proceed as expeditiously as possible. But if there is a contested issue that is litigated in a contested case hearing, the resolution of the issue should be binding on all subsequent department proceedings. In addition, if the contested issue relates to a question submitted to the department engineer under the contract, then the standard by which that decision will be reviewed is that it shall be upheld unless it was based on fraud, misconduct, or such gross mistake as would imply bad faith or failure to exercise an honest judgment. This is the standard by which a claim is judged pursuant to *Texas Department of Transportation v. Jones Brothers Dirt and Paving Contractors, Inc.,* 92 S.W.3d 477 (Tex. 2002). The department believes the new rule will ensure that the same standard of review applies whether a contested issue is decided in a claim proceeding or sanction proceeding. This will make the review of engineer's decisions consistent, and not depend on which proceeding happened to

be referred first for a contested case hearing. New §9.2(i) is also consistent with §9.102(d) of this chapter (relating to Procedure) concerning sanctions, which provides that the imposition of sanctions does not affect a contractor's contractual obligations or limit the commission's contractual remedies.

New §9.6 concerns contract claim procedure for a claim under a CDA. A CDA is an agreement with a private entity that, at a minimum, provides for the design and construction, reconstruction, extension, expansion, or improvement of an eligible project and may also provide for the financing, acquisition, maintenance, or operation of an eligible project. The authorization for the department entering into a CDA is Transportation Code, Chapter 223, Subchapter E. Subchapter E lists the eligible projects. Other provisions in Transportation Code, §91.054 (rail facilities), and §227.023 (Trans-Texas Corridor) also authorize the department to enter into a CDA.

New §9.6 is authorized by Transportation Code, §201.112(a), which specifies that the department may, by rule, establish procedures for the informal resolution of a claim arising out of a contract for a highway project. Transportation Code, Chapter 223, Subchapter E, specifies the procedure by which the department may enter into a CDA and the department's authority to agree on specific matters. Under Transportation Code, §223.203(n) the department may prescribe the general form of a CDA and may include any matter the department considers advantageous to the department. Under Transportation Code, §223.208(b) the department may include any provision that the department considers appropriate.

The department's experience using CDAs shows the need for the new rule. The department has already entered into several CDAs. As the department has expanded the use of CDAs, the department has also expanded their scope. This experience indicates that the ability of developers under CDA's to effectively raise equity and debt financing for CDA projects depends on an administrative process for dispute resolution under which the decision maker is not a party to the CDA, and that produces finality of decision within a reasonable time.

The department believes it may be necessary that CDAs, and especially those that include the developer operating and financing the project, include a dispute resolution procedure other than as contemplated in §9.2. New §9.6 is intended to authorize the executive director to enter into a CDA with a negotiated dispute resolution procedure. The procedure must comply with Transportation Code, §201.112, and meet the requirements of §9.6. Section 9.6 includes specific requirements to ensure that a negotiated procedure complies with Transportation Code, §201.112, and to ensure that the general outline of the procedure is consistent for all CDAs.

Section 9.6(b) describes the applicability of the section to a CDA. Under a specific CDA, all disputes shall be under the dispute procedure in §9.2, or all shall be under §9.6, as specified in the CDA. No CDA shall have some disputes resolved under §9.2 and some under §9.6. If the CDA is silent on the matter then all disputes shall be resolved under §9.2. The purpose is to have one procedure apply to all disputes under a CDA so the parties are sure of the applicable procedure.

Section 9.6(b) also specifies the matters that are, and are not, controlled by a disputes board procedure. A disputes board procedure can be applied to other agreements related to a CDA provided they are specifically identified as being subject to the disputes board procedure. A disputes board procedure does not apply to the listed equitable matters over which courts have jurisdiction, and to other matters identified in a CDA.

Section 9.6(d) specifies the mandatory provisions in a disputes board procedure. There shall be a disputes board that shall consider disputes and issue decisions. Before a dispute is referred to a disputes board, a CDA shall require that a claim be referred for informal dispute resolution, optional mediation, or other alternative dispute resolution process. The party making a claim shall file a certified claim.

Section 9.6(e) specifies that if a CDA includes a claim procedure authorized by the section, the claim procedure may include certain permissive provisions. The subsection authorizes, but does not require, the provisions because the parties may negotiate a different procedure that is acceptable and consistent with Transportation Code, §201.112. When the parties negotiate a CDA they may agree to use the permissive provisions, or agree not to use them. They may even agree to terms that are contrary to the permissive terms so long as the claim procedure complies with the remainder of the section.

The permissive provisions include: a decision of the disputes board is final, conclusive, binding upon, and enforceable against the parties. However, a disputes board decision is subject to review to determine if there was disputes board error. Whether there was disputes board error may be referred for a contested case hearing. If there was disputes board error then the dispute shall be remanded back to a disputes board. A disputes board is authorized to direct that an award be paid from the proceeds of any trust or other pool of project funds that the CDA provides shall be available for payment of such claims. During the processing of a claim, the developer and its subcontractors shall continue work under the CDA, subject to certain specified exceptions.

The department believes subsections (d) and (e) are authorized under Transportation Code, §201.112(a). The law authorizes the department by rule to establish procedures for informal resolution of a claim. New §9.6 labels the disputes board as a "formal" dispute resolution procedure. But the department uses this label only to distinguish the required "informal dispute resolution," the optional mediation, and mandatory "formal dispute resolution" required under §9.6(d)(2). The disputes board is "formal" in the sense that it conducts proceedings on a claim, and makes a decision that is binding on the parties, absent disputes board error. But the disputes board is informal in the sense that the parties can change the disputes board procedure if they agree. Also, a disputes board exists only as authorized in the CDA. It is not permanent and it is not a governmental entity. The department believes Transportation Code, §223.203(n) and §223.208(b) authorize the creation of a disputes board procedure.

Section 9.6(f), Pass-through claims, specifies that a dispute procedure may provide that a developer who is a party to a comprehensive development agreement with the department may make a claim on behalf of a subcontractor. However, the developer must be liable to the subcontractor on the claim.

Section 9.6(g) sets additional mandatory requirements that apply specifically to proceedings of a disputes board. The requirements limit the authority of a disputes board, and set conflict of interest parameters.

Section 9.6(i) sets additional permissive requirements that apply specifically to proceedings of a disputes board.

Section 9.6(j) sets permissive requirements in the CDA concerning a contested case hearing held under Transportation Code, §201.112. The scope of a contested case hearing on a dispute is limited solely to whether a disputes board error occurred upon the disputes board processing the dispute. The executive director's order remanding a dispute to a disputes board, or the executive director's order implementing a disputes board decision following a contested case hearing, are subject to judicial review under Government Code, Chapter 2001, under the substantial evidence rule. Review is limited to whether disputes board error occurred.

Section 9.6(k) specifies that a disputes board agreement may provide that the procedural rules for a contested case may adopt, modify, or not follow the procedural rules in department rules.

Section 9.6(l) clarifies that the section does not interfere with a developer's rights to seek mandamus relief pursuant to Government Code, §22.002(c).

Section 9.6(m) concerns whether information exchanged among the parties during the dispute resolution procedure is confidential.

COMMENTS

No comments on the proposed repeal and new sections were received.

43 TAC §9.2

STATUTORY AUTHORITY

The repeal is adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, under Government Code, §201.112, which allows the commission by rule to establish procedures for the informal resolution of a claim arising out of a contract under the statutes set forth in that section.

CROSS REFERENCE TO STATUTE

Transportation Code, §§201.112, 223.203, and 223.208.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200606247
Bob Jackson
General Counsel
Texas Department of Transportation
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Proposal publication date: September 8, 2006
For further information, please call: (512) 463-8683

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43 TAC §9.2, §9.6

STATUTORY AUTHORITY

The new sections are adopted under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, under Government Code, §201.112, which allows the commission by rule to establish procedures for the informal resolution of a claim arising out of a contract under the statutes set forth in that section. New §9.6 is also authorized by Transportation Code, §223.203, which provides the department may prescribe the general form of a CDA and may include any matter the department considers advantageous to the department, and Transportation Code, §223.208, which provides the department may include in a CDA any provision that the department considers appropriate.

CROSS REFERENCE TO STATUTE

Transportation Code, §§201.112, 223.203, and 223.208.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bob Jackson
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Texas Department of Transportation
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SUBCHAPTER B. HIGHWAY IMPROVEMENT CONTRACTS

43 TAC §§9.10, 9.11, 9.17

The Texas Department of Transportation (department) adopts amendments to §§9.10, 9.11, and 9.17, concerning highway improvement contracts. The amendments to §§9.10, 9.11 and 9.17 are adopted without changes to the proposed text as published in the September 8, 2006, issue of the *Texas Register* (31 TexReg 7308) and will not be republished.

EXPLANATION OF ADOPTED AMENDMENTS

Transportation Code, §361.231 provided for the award of turnpike improvement contracts. The section was repealed by H.B. 2702, 79th Legislature, Regular Session, 2005. Transportation Code, Chapter 223, which is currently cited in the rules, now provides for the award of highway improvement contracts for tolled state highways. References to Transportation Code, §361.231 are removed from §9.10, Purpose, and from the definitions of "building contract," "construction contract," and "maintenance contract" in §9.11.

To improve clarity, minor changes to rule section citations have been made in §9.11(23) and §9.11(34).

Transportation Code, §223.0041, authorizes the department to award a maintenance contract for less than $300,000 to the second lowest bidder if the lowest bidder withdraws its bid after bid opening. This statute further directs the department to adopt rules governing the conditions under which the withdrawal of the bid of the lowest bidder and consideration of contract award to the second lowest bidder will be allowed. Section 9.17 is amended to include building maintenance contracts. This will allow the department to avoid the detrimental effects of delaying needed building maintenance.

COMMENTS

No comments on the proposed amendments were received.

STATUTORY AUTHORITY

The amendments are adopted under Transportation Code, §201.101, which provides the Texas Transportation Commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §223.0041, which authorizes the department to adopt rules regarding the award of certain maintenance contracts to the second lowest bidder.

CROSS REFERENCE TO STATUTE

Transportation Code, §201.101 and §223.0041.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Bob Jackson
General Counsel
Texas Department of Transportation
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For further information, please call: (512) 463-8683

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Proposed Rule Review

State Securities Board

Title 7, Part 7

The State Securities Board (Agency), beginning December 2006, will review and consider for readoption, revision, or repeal Chapters 117, Administrative Guidelines for Registration of Real Estate Programs; 121, Administrative Guidelines for Registration of Oil and Gas Programs; 129, Administrative Guidelines for Registration of Asset-Backed Securities; 141, Administrative Guidelines for Registration of Equipment Programs; and 143, Administrative Guidelines for Registration of Real Estate Investment Trusts, in accordance with Texas Government Code, §2001.039. The rules to be reviewed are located in Title 7, Part 7, of the Texas Administrative Code.

The assessment made by the Agency at this time indicates that the reasons for readopting these chapters continue to exist.

The Agency's Board will consider, among other things, whether the reasons for adoption of these rules continue to exist and whether amendments are needed. Any changes to the rules proposed by the Agency's Board after reviewing the rules and considering the comments received in response to this notice will appear in the "Rules Proposed" section of the *Texas Register* and will be adopted in accordance with the requirements of the Administrative Procedure Act, Texas Government Code Annotated, Chapter 2001. The comment period will last for 30 days beginning with the publication of this notice of intention to review.

Comments or questions regarding this notice of intention to review may be submitted in writing, within 30 days following the publication of this notice in the *Texas Register*, to David Weaver, General Counsel, P.O. Box 13167, Austin, Texas 78711-3167, or sent by facsimile to Mr. Weaver at (512) 305-8310. Comments will be reviewed and discussed in a future Board meeting.

TRD-200606254
Denise Voigt Crawford
Securities Commissioner
State Securities Board
Filed: November 17, 2006

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 16 TAC §4.221(d)

Engineering and Environmental Standards for Recyclable Product to be Used as Road Base		
PARAMETER	LIMITATION	METHOD
Arsenic	Less than 5.000 mg/l	EPA Method 1312, Synthetic Leaching Procedure (SPLP)
Barium	Less than 100.00 mg/l	
Cadmium	less than 1.00 mg/l	
Chromium (total)	less than 5.00 mg/l	
Lead	less than 5.00 mg/l	
Mercury	less than 0.20 mg/l	
Selenium	less than 1.00 mg/l	
Silver	less than 5.00 mg/l	
Benzene	less than 0.50 mg/l	
Chlorides	less than 700.00 mg/l	LDNR leachate test method 1:4 Solid Solution
TPH	less than 100 mg/l	
PH	6 to 12.49 Standard Units	
Minimum compressive strength	35 psi	A Texas Department of Transportation approved procedure appropriate for testing and evaluating a material for compressive strength.

Figure: 16 TAC §9.10(b)

§9.10. Employee Level Examination Requirements for Licenses by Category *(Revised January 2007)*
Table 1

License Categories	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P
Employee Level Exams Offered:																
1. Bobtail Exam - See §9.10(b)(1)					*											
2. Transport Driver Exam - See §9.10(b)(2)			*		*											
3. Engine Fuel Exam - See §9.10(b)(3)					*							*				
4. DOT Cylinder Filling Exam - See §9.10(b)(4)					*	*			*	*						
5. Recreational Vehicle Exam - See §9.10(b)(5)					*								*			
6. Service and Installation Exam - See §9.10(b)(6)				*	*						*			*		
7. Appliance Service and Installation Exam - See §9.10(b)(7)				*	*									*		
8. Motor/Mobile Fuel (Fuel Dispenser) Exam - See §9.10(b)(8)					*		*		*	*						

Figure: 16 TAC §9.52(h)

LP-GAS MANAGEMENT-LEVEL TRAINING AND CONTINUING EDUCATION COURSES (Revised January 2007)
Table One

Course Number	Course Hours	AFT	Course Title	Category D Mgmt.	Category E Mgmt.	Category F Mgmt.	Category G Mgmt.	Category I Mgmt.	Category J Mgmt.	Category K Mgmt.	Category M Mgmt.
1.1	8		Introduction to Propane	x	x	x	x	x	x	x	x
2.1	8	x	Dispenser Operations		x	x	x	x	x		
2.3	8	x	Bobtail Operations		x						
3.1	8		Residential System Layout and Design	x	x					x	
3.2	8	x	Residential System Installation	x	x						
3.3	8	x	Appliance Conversion, Installation and Venting	x	x						
3.5	8		Residential Appliance Controls	x	x						
3.7	8		Electrical Troubleshooting and Repair of Residential Gas Appliances	x	x						
3.8	8	x	Recreational Vehicle Gas Appliances								x
3.11	8		Residential System Inspection	x	x						
6.1	8		Regulatory Compliance for Managers	x	x	x	x	x	x	x	x
80	80		Category E Management Course	x	x	x	x	x	x	x	x
16	16		Category F, G, I, and J Management Course		x	x	x	x	x		

LP-GAS EMPLOYEE-LEVEL TRAINING AND CONTINUING EDUCATION COURSES (Revised January 2007)
Table Two

Course Number	Course Hours	AFT	Course Title	Portable Cylinder Filling	Motor & Mobile Fuel	Bobtail	Bobtail Service & Installation[1]	Service & Installation	Appliance Service & Installation	RV Technician
1.1	8		Introduction to Propane	x	x	x	x	x	x	x
2.1	8	x	Dispenser Operations	x	x	x	x			
2.3	8	x	Bobtail Operations			x	x			
3.1	8		Residential System Layout and Design				x	x		
3.2	8	x	Residential System Installation				x	x		
3.3	8	x	Appliance Conversion, Installation and Venting				x	x	x	
3.5	8		Residential Appliance Controls				x	x	x	x
3.7	8		Electrical Troubleshooting and Repair of Residential Gas Appliances				x	x	x	
3.8	8	x	Recreational Vehicle Gas Appliances							x
3.11	8		Residential System Inspection			x	x	x	x	
80	80		Category E Management Course	x	x	x	x	x	x	x
16	16		Category F, G, I, and J Management Course	x	x	x	x			

[1] A "Bobtail/Service & Installation" notation on an LP-gas certification card indicates the individual is authorized to perform bobtail and service and installation activities.

COURSES WHICH COUNT TOWARDS CONTINUING EDUCATION CREDIT FOR MANAGEMENT-LEVEL CERTIFICATE HOLDERS (September 2005)
Table Three

Course Number	Credit Hours[1]	Course Title	Category D Mgmt.	Category E Mgmt.	Category F Mgmt.	Category G Mgmt.	Category I Mgmt.	Category J Mgmt.	Category K Mgmt.	Category M Mgmt.
CETP 1	8	Basic Principles and Practices	x	x	x	x	x	x	x	x
CETP 2.1	8	Propane Delivery Basics		x						
CETP 2.2	8	Operating a Bobtail to Deliver Propane		x						
CETP 2.3	8	Operating a Transport to Deliver Propane		x						
CETP 2.4	8	Operating a Cylinder Vehicle to Deliver Propane		x				x		
CETP 2.5	8	Operating a Truck, Tank Trailer or Tractor/ Trailer to Deliver or Relocate ASME Tanks		x						
CETP 3.1	8	Maintaining ASME Tanks		x						
CETP 3.2	8	Maintaining DOT Cylinders		x	x		x	x		
CETP 3.3	8	Operating Dispensing Equipment to Fill Containers		x	x	x	x	x		
CETP 3.4	8	Maintaining Bulk Plant Equipment		x						
CETP 3.5	8	Performing Cargo Tank Product Transfers		x						
CETP 3.6	8	Performing Railcar Product Transfers		x						
CETP 3.7	8	Maintaining DOT Intermodal Tanks		x						
CETP 4.1	8	Layout, Design, and Selection of a Vapor Distribution System	x	x						
CETP 4.2	8	Preparing and Installing Vapor Distribution Systems	x	x						
CETP 5	8	Liquid Transfer System Operations		x						
CETP 6	8	Appliance Installation	x	x						
CETP 7	8	Appliance Service	x	x						
CETP 8	8	Large Industrial/Commercial Gas-Fired Equipment Connection & Service	x	x						
PERC GAS Check	8	GAS Check	x	x						

[1] Credit hours may not equal the total number of course hours.

COURSES WHICH COUNT TOWARDS CONTINUING EDUCATION CREDIT
FOR EMPLOYEE-LEVEL APPLICANTS OR CERTIFICATE HOLDERS (Revised January 2007)
Table Four

Course Number	Credit Hours[1]	Course Title	Portable Cylinder Filling	Motor & Mobile Fuel	Bobtail	Bobtail Service & Installation[2]	Service & Installation	Appliance Service & Installation	RV Technician
CETP 1	8	Basic Principles and Practices	x	x	x	x	x	x	x
CETP 2.1	8	Propane Delivery Basics			x	x			
CETP 2.2	8	Operating a Bobtail to Deliver Propane			x	x			
CETP 2.3	8	Operating a Transport to Deliver Propane			x	x			
CETP 2.4	8	Operating a Cylinder Vehicle to Deliver Propane							
CETP 2.5	8	Operating a Truck, Tank Trailer or Tractor/Trailer to Deliver or Relocate ASME Tanks					x		
CETP 3.1	8	Maintaining ASME Tanks					x		
CETP 3.2	8	Maintaining DOT Cylinders	x						
CETP 3.3	8	Operating Dispensing Equipment to Fill Containers	x	x					
CETP 3.4	8	Maintaining Bulk Plant Equipment					x		
CETP 3.5	8	Performing Cargo Tank Product Transfers			x	x			
CETP 3.6	8	Performing Railcar Product Transfers							
CETP 3.7	8	Maintaining DOT IM Tanks							
CETP 4.1	8	Layout, Design, and Selection of a Vapor Distribution System				x	x		
CETP 4.2	8	Preparing and Installing Vapor Distribution Systems				x	x		
CETP 5	8	Liquid Transfer System Operations			x	x	x		
CETP 6	8	Appliance Installation				x	x	x	
CETP 7	8	Appliance Service				x	x	x	
CETP 8	8	Large Industrial/Commercial Gas-Fired Equipment Connection & Service				x	x		
PERC GAS Check	8	GAS Check			x	x	x	x	

Note: The CETP 2.4, 3.6, and 3.7 courses are not accepted by the Commission for continuing education credit.

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[1] Credit hours may not equal the total number of course hours.

[2] A "Bobtail/Service & Installation" notation on an LP-gas certification card indicates the individual is authorized to perform bobtail and service and installation activities.

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Brazos Valley Council of Governments

Request for Quote

Policy Studies, Inc., seeks to procure eligible vendors for the purchase of prepaid phones and minutes to be used as participant rewards in its various offices in the Brazos Valley. Potential vendors will be required to submit pricing information as delineated in the Request for Quotes from PSI.

PSI Staff will evaluate vendor responses to this solicitation based on vendor eligibility, pricing, and locations served. HUB businesses are encouraged to apply. PSI reserves the right to not award any contracts under this RFQ. PSI reserves the right to contract with multiple vendors and makes no guarantees of quantities to be purchased.

Vendors interested in receiving a copy of the RFQ may contact Philip Beard at 3991 East 29th St., Bryan, TX; (979) 595-2800 x2243; Fax (979) 595-2812; www.bvjobs.org; pbeard@bvcog.org. Completed request must be received by 4 p.m. on November 30, 2006 to receive consideration.

TRD-200606238
Tom Wilkinson
Executive Director
Brazos Valley Council of Governments
Filed: November 15, 2006

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Department of State Health Services

Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Harlingen	Texas Coast Cardiovascular LLC DBA Lisa Dix-Emperador MD PA	L05983	Harlingen	00	11/07/06
Perrytown	Ochiltree County Hospital District	L06006	Perrytown	00	10/30/06
Throughout Tx	Performance Irrigation	L06037	Eldorado	00	11/10/06

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Alvin	INEOS USA LLC	L01422	Alvin	66	10/31/06
Austin	St Davids Healthcare Partnership LP LLP DBA North Austin Medical Ctr	L04910	Austin	66	11/09/06
Austin	St Davids Healthcare Partnership LP LLP DBA North Austin Medical Center	L04910	Austin	65	11/08/06
Austin	Heart Hospital IV LP DBA Heart Hospital of Austin	L05215	Austin	20	11/08/06
Austin	Texas Cardiovascular Consultants PA	L05246	Austin	24	11/10/06
Austin	Columbia St Davids Healthcare System LP DBA SouthAustin Hospital	L03273	Austin	69	11/13/06
Austin	Austin Heart PA	L05580	Austin	14	11/10/06
Austin	Austin Heart PA	L04623	Austin	39	11/13/06
Baytown	Lanxess Corporation	L05810	Baytown	03	11/02/06
Beaumont	Lamar University	L04047	Beaumont	24	11/06/06
Beaumont	ExxonMobil Oil Corporation	L00603	Beaumont	76	11/14/06
Beaumont	Advanced Cardiovascular Specialists LLP	L05512	Beaumont	09	10/31/06
Bonham	Attentus Bonham LP DBA Red River Regional Hospital	L03331	Bonham	32	11/08/06
Borger	Chevron Phillips Chemical Company LP	L05181	Borger	12	11/09/06
Bowie	Bowie Hospital Authority DBA Bowie Memorial Hospital	L02327	Bowie	17	11/13/06
Brenham	Trinity Community Medical Center of Brenham	L03419	Brenham	23	11/06/06
Carrollton	Alpha Energy Laboratories Inc	L02814	Carrollton	15	11/06/06
Channelview	Tapco International Inc DBA Tapco Enpro International	L04990	Channelview	21	11/14/06
Channelview	Lyondell Chemical Company	L04439	Channelview	22	11/03/06
Conroe	Drilling Specialties Company	L04825	Conroe	11	11/03/06
Corpus Christi	Spohn Hospital	L02495	Corpus Christi	88	11/08/06
Corpus Christi	The Corpus Christi Medical Center Bay Area	L04723	Corpus Christi	42	11/06/06
Corpus Christi	Cardiology Associates of Corpus Christi	L04611	Corpus Christi	25	11/07/06
Corpus Christi	Flint Hills Resources LP	L00322	Corpus Christi	40	11/01/06
Corpus Christi	Corpus Christi Radiology Center	L04493	Corpus Christi	14	11/03/06
Corpus Christi	Christus Health DBA Christus Spohn Hospital Memorial	L00265	Corpus Christi	83	11/06/06
Dallas	North Texas Heart Center PA	L04608	Dallas	33	11/06/06
Dallas	Cumbre Inc	L05474	Dallas	04	11/09/06
Dallas	Methodist Hospitals of Dallas Radiology Services	L00659	Dallas	48	11/03/06
Dallas	Cardinal Health	L05610	Dallas	08	11/03/06
Dallas	Richardson Diagnostic Imaging I LP DBA Quantum Diagnostic Imaging	L05468	Dallas	09	11/03/06
Dallas	Dallas Cardiology Associates PA DBA Heartplace East	L04607	Dallas	49	11/03/06

AMENDMENTS TO EXISTING LICENSES ISSUED CONTINUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Dallas	Richardson Diagnostic Imaging I LP DBA Quantum Diagnostic Imaging	L05468	Dallas	08	10/31/06
Dallas	Texas Oncology PA DBA Sammons Cancer Center	L04787	Dallas	34	10/31/06
Dallas	Renaissance Hospital Dallas Inc	L05900	Dallas	02	10/31/06
Decatur	Wise Regional Health System	L02382	Decatur	25	11/06/06
Denton	TTHR Limited Partnership DBA Presbyterian Hospital of Denton	L04003	Denton	41	11/02/06
Eagle Pass	Fort Duncan Medical Center	L05640	Eagle Pass	07	11/13/06
Edinburg	McAllen Hospitals LP DBA Edinburg Regional Medical Ctr	L04262	Edinburg	17	11/14/06
El Paso	El Paso Community College	L05069	El Paso	02	11/06/06
El Paso	Blood Systems Inc DBA United Blood Services	L05841	El Paso	02	11/06/06
El Paso	Physicians Specialty Hospital of El Paso East LP DBA Physicians Hospital	L05676	El Paso	05	10/31/06
Fort Worth	Physician Reliance LP DBA Texas Oncology at Klabzuba	L05545	Fort Worth	19	11/13/06
Fort Worth	University of North Texas Health Science Center Fort Worth	L02518	Fort Worth	32	11/16/06
Fort Worth	Heart Center of North Texas PA	L05338	Fort Worth	10	11/10/06
Fort Worth	John Peter Smith Hospital	L02208	Fort Worth	61	11/07/06
Fort Worth	Harris Methodist Fort Worth	L01837	Fort Worth	102	11/06/06
Friendswood	Raj K. Bhalla MD PA	L05469	Friendswood	02	11/06/06
Garland	Cardiology Consultants of North Dallas PA	L05454	Garland	08	11/02/06
Georgetown	Southwestern University at Georgetown	L00372	Georgetown	21	11/06/06
Granbury	Granbury Hospital Corporation DBA Lake Granbury Medical Center	L02903	Granbury	29	11/10/06
Hallsville	Southwestern Electric Power Company	L03297	Hallsville	18	11/06/06
Harlingen	Cockins Kim A MD FACC	L05845	Harlingen	02	11/14/06
Houston	Houston Interventional Cardiology PA	L05470	Houston	03	11/14/06
Houston	Houston Refining LP	L00187	Houston	59	11/14/06
Houston	Cardinal Health	L01911	Houston	136	11/08/06
Houston	Texas Genco II LP	L02063	Houston	66	11/09/06
Houston	V B Shenoy MD PA DBA Northwest Cardiology Clinic	L05513	Houston	04	11/08/06
Houston	Cardinal Health	L05536	Houston	20	11/10/06
Houston	OCTG LLP	L05871	Houston	01	11/09/06
Houston	Memorial Hermann Hospital System Inc DBA Memorial Hermann Hospital	L00650	Houston	80	11/01/06
Houston	Cardiovascular Clinic of Texas	L04963	Houston	06	11/02/06
Houston	River Oaks Imaging and Diagnostic LP DBA River Oaks Imaging and Diagnostic	L04342	Houston	52	11/02/06
Houston	Felipe Rios MD DBA Felipe Rios MD and Associates PA	L05700	Houston	03	11/06/06
Houston	American Diagnostic Tech LLC	L05514	Houston	30	11/01/06
Houston	Houston Interventional Cardiology PA	L05470	Houston	02	11/02/06
Houston	TOPS Specialty Hospital LTD DBA TOPS Surgical Specialty Hospital	L05441	Houston	07	10/30/06
Houston	Digirad Imaging Solutions Inc	L05414	Houston	26	11/01/06
Houston	The Methodist Hospital	L00457	Houston	145	10/31/06
Kingwood	Lieber-Moore Cardiology Associates DBA Texas Cardiology Associates	L04622	Kingwood	11	10/31/06
La Grange	Austin Heart La Grange	L05516	La Grange	16	11/10/06
La Porte	Total Petrochemicals USA Inc	L04640	La Porte	18	11/09/06

AMENDMENTS TO EXISTING LICENSES ISSUED CONTINUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Laredo	Laredo Texas Hospital Company LP DBA Laredo Medical Center	L01306	Laredo	59	11/08/06
Live Oak	Eldorado Chemical Co Inc	L04366	Live Oak	08	11/08/06
Lubbock	Isorx Texas LTD	L05284	Lubbock	20	11/15/06
Lubbock	Isorx Texas LTD	L05284	Lubbock	19	11/02/06
Lufkin	The Heart Institute of East Texas PA	L04147	Lufkin	14	11/08/06
Lufkin	Memorial Medical Center of East Texas	L01346	Lufkin	76	11/02/06
Marble Falls	Austin Heart PA DBA Austin Heart Clinic Marble Falls	L05505	Marble Falls	14	11/10/06
McAllen	Texas Oncology PA DBA South Texas PET Imaging	L05485	McAllen	06	11/15/06
McKinney	Raytheon Company	L05632	McKinney	02	11/08/06
Midland	New Tech Systems Inc	L05098	Midland	04	11/02/06
Missouri City	Fort Bend Hospital Inc DBA Fort Bend Medical Center	L03457	Missouri City	28	11/14/06
New Braunfels	McKenna Memorial Hospital DBA McKenna Memorial Hospital Outpatient Imaging Center	L05995	New Braunfels	01	11/02/06
Nocona	Nocona Hospital District DBA Nocona General Hospital	L04977	Nocona	10	11/07/06
Odessa	Odessa Heart Institute	L05439	Odessa	05	11/14/06
Odessa	Suresh N Gadasalli MD PA DBA The Healthy Heart Center	L05156	Odessa	13	11/10/06
Odessa	Cemex Cement of Texas LP	L00118	Odessa	25	11/08/06
Orange	Lanxess Corporation	L00976	Orange	55	11/03/06
Palestine	Palestine Principal Healthcare Limited Partnership DBA Palestine Regional Medical Center	L02728	Palestine	40	11/07/06
Pasadena	Goodyear Tire & Rubber Company	L04321	Pasadena	10	11/14/06
Plano	Physician Reliance Network Inc Texas Oncology Plano West Cancer Center	L05896	Pasadena	05	11/06/06
Plano	Baylor Regional Medical Center of Plano	L05844	Plano	04	11/15/06
Plano	Women's Diagnostic of Texas	L05601	Plano	06	11/07/06
Plano	Cardiovascular Consultants of North Texas DBA Cardiovascular Consultants Plano	L05690	Plano	03	10/31/06
Port Arthur	Christus Health Southeast Texas DBA Christus Hospital St Mary	L01212	Port Arthur	92	11/03/06
Richardson	Richardson Cardiology Associates	L05667	Richardson	05	11/08/06
Round Rock	Austin Heart PA DBA Austin Heart	L05456	Round Rock	16	11/08/06
San Antonio	Christus Santa Rosa Surgery Center LLP DBA Christus Santa Rosa Surgery Center	L05805	San Antonio	04	11/08/06
San Antonio	VHS San Antonio Imaging Partners LP DBA Baptist M&S Imaging Centers	L04506	San Antonio	57	11/08/06
San Antonio	Southwest Genetics PA	L04490	San Antonio	12	11/02/06
San Antonio	Medlab DBA Clinical Laboratory	L04824	San Antonio	09	11/03/06
San Antonio	Methodist Healthcare System of San Antonio DBA Methodist Hospital	L00594	San Antonio	219	11/03/06
San Marcos	Texas State University	L03321	San Marcos	24	11/08/06
San Marcos	Austin Heart PA DBA Austin Heart San Marcos	L05452	San Marcos	20	11/10/06
Stafford	Amar Diagnostics and Imaging LLC	L05934	Stafford	01	11/10/06
Sulphur Springs	Medical Surgical Clinic of Sulphur Springs DBA Sulphur Springs Family Healthcare Associates	L05701	Sulphur Springs	08	11/07/06

AMENDMENTS TO EXISTING LICENSES ISSUED CONTINUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Temple	Scott and White Memorial Hospital and Scott Sherwood and Brindley Foundation DBA Scott and White Memorial Hospital	L00331	Temple	76	11/08/06
Temple	Kings Daughters Hospital	L00666	Temple	47	11/10/06
The Woodlands	St Lukes Community Medical Center the Woodlands	L05763	The Woodlands	06	11/14/06
Throughout Tx	Weatherford US LP	L02756	Alvin	23	11/03/06
Throughout Tx	Cornerstone Testing and Engineering Inc	L04725	Amarillo	07	11/03/06
Throughout Tx	Texas Department of Transportation	L00197	Austin	122	11/07/06
Throughout Tx	Gulf Coast Weld Spec	L05426	Beaumont	49	11/02/06
Throughout Tx	Enercon Services Inc	L05447	Dallas	06	11/07/06
Throughout Tx	Century Inspection Inc	L00062	Dallas	101	11/03/06
Throughout Tx	IRISNDT Inc	L04769	Deer Park	33	11/01/06
Throughout Tx	AMEC Earth & Environmental Inc	L03622	El Paso	20	11/03/06
Throughout Tx	Reynolds Asphalt & Construction Co	L05004	Euless	06	11/08/06
Throughout Tx	Fugro Consultants LP	L05843	Ft. Worth	02	11/07/06
Throughout Tx	CMJ Engineering Inc	L05564	Ft. Worth	04	11/02/06
Throughout Tx	City of Garland Neighborhood Development	L05458	Garland	04	11/08/06
Throughout Tx	Arisa & Associates Inc	L04964	Hollywood	23	11/07/06
Throughout Tx	Varco LP FKA Tuboscope Vetco International Inc	L00287	Houston	120	11/13/06
Throughout Tx	Industrial Nuclear Company	L04508	Houston	06	11/09/06
Throughout Tx	METCO	L03018	Houston	164	11/08/06
Throughout Tx	Aviles Engineering Corporation	L03016	Houston	21	11/07/06
Throughout Tx	Material Inspection Technology Inc	L05672	Houston	21	11/07/06
Throughout Tx	QC Laboratories Inc	L04750	Houston	18	11/06/06
Throughout Tx	HVJ Associates Inc	L03813	Houston	32	10/31/06
Throughout Tx	Baker Hughes Oilfield Operations Inc DBA Baker Atlas	L00446	Houston	160	11/03/06
Throughout Tx	Goolsby Testing Laboratories Inc	L03115	Humble	83	11/07/06
Throughout Tx	Perf-O-Log Inc	L05478	Iowa Colony	17	11/08/06
Throughout Tx	United States Environmental Services LLC	L05801	La Porte	01	10/31/06
Throughout Tx	Longview Asphalt Inc	L04827	Longview	08	11/06/06
Throughout Tx	High Plains Underground Water Conservation District No 1	L02598	Lubbock	20	11/03/06
Throughout Tx	Isotech Laboratories Inc	L04283	Midland	20	11/03/06
Throughout Tx	Allen Inspection Service	L03003	Odessa	09	11/08/06
Throughout Tx	Permian NonDestructive Testing Inc	L06001	Odessa	03	11/02/06
Throughout Tx	Conam Inspection & Engineering Inc	L05010	Pasadena	116	11/09/06
Throughout Tx	TechCorr USA LLC	L05972	Pasadena	13	11/02/06
Throughout Tx	Midwest Inspection Services	L03120	Perryton	95	11/13/06
Throughout Tx	Schlumberger Technology Corporation	L01833	Sugar Land	136	11/08/06
Throughout Tx	BJ Services Company USA	L02684	Tomball	54	11/08/06
Tomball	Tomball Hospital Authority DBA Tomball Regional Hospital	L02514	Tomball	40	11/07/06
Tyler	East Texas Medical Center Healthcare Associates DBA First Physicians	L05702	Tyler	10	11/06/06
Tyler	Cardiovascular Associates of East Texas PA	L04800	Tyler	19	11/09/06
Waco	Lehigh Cement Company	L01087	Waco	21	10/31/06
Waxahachie	Baylor Medical Center at Waxahachie	L04536	Waxahachie	28	11/13/06
Webster	Bharat Patel MD PA DBA Bay Area Heart Center	L05444	Webster	04	11/01/06
Webster	River Oaks Imaging and Diagnostic LP DBA River Oaks Imaging and Diagnostic	L05475	Webster	07	11/02/06
Weslaco	Knapp Medical Center	L03290	Weslaco	38	11/08/06

AMENDMENTS TO EXISTING LICENSES ISSUED CONTINUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Wichita Falls	Bradley E Samuelson MD	L05682	Wichita Falls	03	10/30/06

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Baytown	Jacinto Medical Corporation DBA Jacinto MRI and Diagnostic Center	L04808	Baytown	15	10/30/06
Channelview	Arctic Pipe Inspection	L05210	Channelview	02	11/09/06
Conroe	Montgomery County Cardiovascular Associates PA	L05151	Conroe	14	11/08/06
Floresville	Wilson County Memorial Medical Center DBA Connally Memorial Medical Center	L03471	Floresville	17	11/01/06
Galena Park	United States Gypsum Company	L03896	Galena Park	09	11/01/06
Houston	Saint-Gobain Ceramics and Plastics	L04895	Houston	08	11/13/06
Houston	Gulf Coast Cancer and Diagnostic Center at Southeast Inc DBA Gulf Coast Cancer Center at Southeast	L05194	Houston	09	10/31/06
Lubbock	University Medical Center	L04719	Lubbock	89	11/07/06
Lubbock	Lubbock Texas - Highland Medical Center LP DBA Highland Community Hospital	L02467	Lubbock	30	11/01/06
San Antonio	Methodist Healthcare System of San Antonio DBA Methodist Hospital	L00594	San Antonio	220	11/13/06
Throughout Tx	ConocoPhillips Company DBA Borger Refinery and NGL Center	L02480	Borger	47	10/27/06
Tyler	Stewart Regional Blood Center	L04826	Tyler	09	11/10/06
Tyler	Physican Reliance Network Inc DBA Tyler Cancer Center	L04788	Tyler	11	11/13/06

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Brownwood	Heart of Texas Internal Medicine Associates PA	L05006	Brownwood	14	11/15/06
Throughout Tx	RK Hall Construction LLC	L05912	Paris	01	11/14/06

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of Title 25 Texas Administrative Code (TAC) Chapter 289 regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3189. For information call (512) 834-6688.

TRD-200606282
Cathy Campbell
General Counsel
Department of State Health Services
Filed: November 20, 2006

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Notice of Amendment Number 41 to the Radioactive Material License of Waste Control Specialists, L.L.C.

Notice is hereby given by the Department of State Health Services (department), Radiation Safety Licensing Branch, that it has amended Radioactive Material License Number L04971 issued to Waste Control Specialists, L.L.C. (WCS) located in Andrews County, Texas, one mile North of State Highway 176; 250 feet East of the Texas/New Mexico State Line; 30 miles West of Andrews, Texas.

Amendment number 41 requires that the waste storage pad be inspected on a semi-annual basis and that bioassays be preformed within 3 working days on individuals exposed to 10 or more DAC hours of radioactive materials in a period of 24 hours.

The department has determined that the amendment of the license and the terms of conditions provide reasonable assurance that the licensee's radioactive waste processing facility is operated in accordance with the requirements of Texas Administrative Code (TAC), Chapter 289; the amendment of the license will not be inimical to the health and safety of the public or the environment; and the activity represented by the amendment of the license will not have a significant effect on the human environment.

This notice affords the opportunity for a public hearing upon written request within 30 days of the date of publication of this notice by a person affected as set out in 25 TAC, §289.205(f). A "person affected" is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to a county, in which the radioactive material is or will be located; or (b) doing business or has a legal interest in land in the county or adjacent county.

A person affected may request a hearing by writing Richard A. Ratliff, P.E., Radiation Program Officer, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3189. Any request for a hearing must contain the name and address of the person who considers himself affected by this action, identify the subject license, specify the reasons why the person considers himself affected, and state the relief sought. If the person is represented by an agent, the name and address of the agent must be stated. Should no request for a public hearing be timely filed, the agency action will be final.

A public hearing, if requested, shall be conducted in accordance with the provisions of Texas Health and Safety Code, Chapter 401, the Administrative Procedure Act (Texas Government Code Chapter 2001), the formal hearing procedures of the department (25 TAC, §1.21 et seq.) and the procedures of the State Office of Administrative Hearings (1 TAC, Chapter 155).

A copy of the license amendment and supporting materials are available, by appointment, for public inspection and copying at the office of the Radiation Safety Licensing Branch, Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, 8:00 a.m. to 5:00 p.m., Monday - Friday (except holidays). Information relative to inspection and copying the documents may be obtained by contacting Chrissie Toungate, Custodian of Records, Radiation Safety Licensing Branch.

TRD-200606280
Cathy Campbell
General Counsel
Department of State Health Services
Filed: November 20, 2006

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Notice of Emergency Impoundment Order on Top Dollar Pawn

Notice is hereby given that the Department of State Health Services (department) has ordered that all radioactive material located at Top Dollar Pawn (unlicensed), Waco, be impounded and transferred to the department's Austin headquarters for temporary storage.

A copy of all relevant material is available, by appointment, for public inspection at the Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6770, Monday-Friday, 8:00 a.m. to 5:00 p.m. (except holidays).

TRD-200606281
Cathy Campbell
General Counsel
Department of State Health Services
Filed: November 20, 2006

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Texas Department of Housing and Community Affairs

Notice of Public Hearing

Multifamily Housing Revenue Bonds (Park Place at Loyola Apartments) Series 2006

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Issuer") at LBJ High School, 7309 Lazy Creek Drive, Austin, Travis County, Texas 78724, at 6:00 p.m. on December 18, 2006, with respect to an issue of tax-exempt multifamily residential rental development revenue bonds in an aggregate principal amount not to exceed $15,000,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Issuer. The proceeds of the Bonds will be loaned to Park Place at Loyola, LP, a limited partnership, or a related person or affiliate thereof (the "Borrower") to finance a portion of the costs of acquiring, constructing, and equipping a multifamily housing development (the "Development") described as follows: 252-unit multifamily residential rental development to be located at approximately the 6200 block of Loyola Lane, Travis County, Texas. Upon the issuance of the Bonds, the Development will be owned by the Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Development and the issuance of the Bonds. Questions or requests for additional information may be directed to Teresa Morales at the Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas 78711-3941; (512) 475-3344; and/or teresa.morales@tdhca.state.tx.us.

Persons who intend to appear at the hearing and express their views are invited to contact Teresa Morales in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Teresa Morales prior to the date scheduled for the hearing. Individuals who require a language interpreter for the hearing should contact Teresa Morales at least three days prior to the hearing date. Personas que hablan español y requieren un intérprete, favor de llamar a Jorge Reyes al siguiente número (512) 475-4577 por lo menos tres días antes de la junta para hacer los preparativos apropiados.

Individuals who require auxiliary aids in order to attend this meeting should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943 or Relay Texas at (800) 735-2989 at least two days before the meeting so that appropriate arrangements can be made.

TRD-200606306
Michael G. Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: November 20, 2006

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Public Utility Commission of Texas

Announcement of Application for Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on November 14, 2006, to amend a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable to Amend its State-Issued Certificate of Franchise Authority, Project Number 33497 before the Public Utility Commission of Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 33497.

TRD-200606269
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 17, 2006

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Notice of Application for Certificate of Convenience and Necessity for a Proposed Transmission Line in Floyd and Hale Counties, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas (commission) an application on November 17, 2006, for a certificate of convenience and necessity for a proposed transmission line in Floyd and Hale Counties, Texas.

Docket Style and Number: Application of Southwestern Public Service Company for a Certificate of Convenience and Necessity (CCN) for a Proposed Transmission Line in Floyd and Hale Counties, Texas. Docket Number 33456.

The Application: The project is designated the Cox Interchange to Floyd County Interchange 115-kV Transmission Line Project. SPS stated that the proposed transmission line is needed to improve reliability of the transmission service to the customers in a five county area. The miles of right-of-way for this project will be approximately 18.6 - 21.2 miles (depending on which route is selected).

Persons wishing to intervene or comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. The deadline for intervention in this proceeding is January 4, 2007. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 33456.

TRD-200606276
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: November 20, 2006

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Sam Houston State University

Consultant Proposal Request

This request for consulting services is filed under the provisions of Texas Civil Statutes, Article 6252-11c. Sam Houston State University (SHSU) seeks written proposals from qualified consulting firms based in Washington, D.C. to represent and assist the University in developing projects deemed important to the University. Important considerations in the award of the proposed contract will be the years of experience in securing funding assistance for university programs and facilities, a strong bipartisan presence within the firm with considerable experience working with legislative staffs, and a record of substantial success in dealing with the Congress and the Executive Agencies. Excellent skills in university grant and contract awards are necessary. Substantial experience in the development of strategies for corporate participation in university-sponsored development projects especially those relating to environmental and telecommunication issues. Interested parties are invited to express their interest and describe their capabilities on or before December 31, 2006. The consulting services desired are a continuation of a service previously performed by a private consultant. This contract represents a renewal and will be awarded to the previous consultant unless a better offer is received. The term of the contract is to be from date of award for a twelve (12) month period with options to renew. Further technical information can be obtained from Dr. Richard H. Ward at (936) 294-3621. Deadline for receipt of proposals is 4:00 p.m. December 31, 2006. Date and time will be stamped on the proposals by the Office of Research and Special Programs. Proposals received later than this date and time will not be considered. All proposals must be specific and must be responsive to the criteria set forth in this request.

I. GENERAL INSTRUCTIONS

Submit one (1) copy of your proposal in a sealed envelope to: Office of Research and Special Programs, P.O. Box 2448, Sam Houston State University, Huntsville, Texas, 77341-2448 before 4:00 p.m., December 31, 2006. Proposals may be modified or withdrawn prior to the established due date.

II. DISCUSSIONS WITH OFFERERS AND AWARD

The University reserves the right to conduct discussions with any or all offerers, or to make an award of a contract without such discussions based only on evaluation of the written proposals. The University also reserves the right to designate a review committee in evaluating the proposals according to the criteria set forth under Section III entitled "Scope of Work." The Associate Vice President for Research and Special Programs shall make a written determination showing the basis upon which the award was made and such determination shall be kept on file.

III. SCOPE OF WORK

1. Representation and assistance in developing projects deemed important to the University.

2. Assistance in obtaining funding for University projects.

3. Consulting and representation as directed by Sam Houston State University.

IV. EVALUATION

A. Criteria for Evaluation of Proposals:

Firms will be evaluated on time and quality of experience in representing and assisting universities in developing projects. Equal consideration will be given to past performance, writing skills, and the effectiveness of the firm's strategies.

B. Your proposal should include costs for all related expenses.

V. TERMINATION

This Request for Proposal (RFP) in no manner obligates SHSU to the eventual purchase of any services described, implied, or which may be proposed until confirmed by a written contract. Progress towards this end is solely at the discretion of SHSU and may be terminated without penalty or obligation at any time prior to the signing of a contract. SHSU reserves the right to cancel this RFP at any time, for any reason and to reject any or all proposals. SHSU requires that the responses to this RFP must state that the proposed terms will remain in effect for at least forty-five (45) days after the scheduled response opening.

TRD-200606271
Dr. James F. Gaertner
President
Sam Houston State University
Filed: November 20, 2006

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Sul Ross State University

Request for Proposals

Pursuant to Texas Government Code, Article 2254, Sul Ross State University, a member of the Texas State University System, announces the solicitation for consultant services to advise and assist with the development, management and administration of a Title V Grant.

Project Summary: Sul Ross State University is applying for a federally funded Title V grant. The university plans on three activities for the grant which will run from the fall of 2007 through the fall of 2012. One phase of the project is to develop a "one-stop" center to house the Offices of Admissions, Recruiting, Financial Aid, Registrar's, Cashier's, and the Alumni Association. The second activity would be the development of the Office of the First Year Student, which will coordinate orientations, PASS, several grants for first generation students, coordination of academic advising, and the implementation of a First Year Experience Introduction to Speech Communication course for all incoming freshmen. Additional activities would be the coordination of tutoring and mentoring programs for first year students. The final phase of the grant is to implement a pilot Second Year Experience Program, which would offer academic, social, and personal support for second year students who need their support system extended beyond the first year. In addition to assisting with grant development, the successful vendor will share in the responsibility for assurance of the attainment of the grant objectives, compliance with the terms and conditions of the grant and will provide services such as assistance in budget management, consultations, performance reporting, and review and editing of reports. Similar services have previously been provided by a consultant. Sul Ross State University intends to award the contract for the consulting services to a previously used consultant unless a better offer is received.

In accordance with the provisions of Texas Government Code §2254.028(c), the president of Sul Ross State University has approved the use of a private consultant and has determined that the required fact exists.

Proposals are to be received no later than 4:45 p.m. Wednesday, January 3, 2007. A copy of the request for proposal packet is available upon request from Patty Roach, Director of Purchasing, Sul Ross State University, P.O. Box C-116, Alpine, Texas 79832, phone (432) 837-8045, fax (432) 837-8046.

Vendors will be evaluated on credentials for the work to be done, previous successful experience on similar grant projects and interpersonal and written communication skills. Proposals will be evaluated on the fulfillment of the requirements as outlined in the specifications, a fee schedule which is appropriate to the proposed activities, and the quality of performance on previous contracts or experience on similar projects.

The University reserves the right to reject any and all proposals received if it is determined to be in the best interest of the University. All material submitted in response to this request becomes the property of the University and may be reviewed by other vendors after the official review of the proposals.

TRD-200606272
Patty Roach
Purchasing Director
Sul Ross State University
Filed: November 20, 2006

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Texas Department of Transportation

Public Notice - Aviation

Pursuant to Transportation Code, §21.111, and Title 43, Texas Administrative Code, §30.209, the Texas Department of Transportation conducts public hearings to receive comments from interested parties concerning proposed approval of various aviation projects.

For information regarding actions and times for aviation public hearings, please go to the following web site: **http://www.dot.state.tx.us.** Under Citizen, click on Public Hearings, then click on Aviation Division. Or, contact Joyce Moulton, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4501 or 800-68-PILOT.

TRD-200606270
Bob Jackson
General Counsel
Texas Department of Transportation
Filed: November 20, 2006

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The University of Texas System

Invitation for Consultants to Provide Offers of Consultant Services

In accordance with the provisions of Chapter 2254 *Texas Government Code*, The University of Texas System Administration (the "University") is currently soliciting proposals to provide consulting services to provide a review of the effectiveness of the University's Compliance Programs.

The Chancellor of the UT System has made a finding that the Consulting Services are necessary. While the University has a substantial need for the Consulting Services, the University does not currently have staff with expertise or experience with the Consulting Services and the University cannot obtain such Consulting Services through a contract with another state governmental entity.

The award for services will be made by issuance of an Invitation for Offers (IFO) for the consulting services. In selecting a consultant the University will:

(1) base its choice on demonstrated competence, knowledge, and qualifications and on the reasonableness of the proposed fee for the services; and

(2) if other considerations are equal, give preference to a consultant whose principal place of business is in the state or who will manage the consulting contract wholly from an office in the state.

The individual to be contacted with an offer to provide such consulting services or to obtain a copy of the Invitation for Offers for the consulting services identified in this invitation is:

Mr. Art Martinez

Executive Director for Board Services

The University of Texas System

201 West 7th Street Suite 820

Austin, Texas 78701-2981

Voice: (512) 499-4402

Fax: (512) 499-4425

Email: amartinez@utsystem.edu

The proposal submission deadline will be 3:00 p.m. Central Prevailing Time, December 11, 2006.

TRD-200606286
Francie A. Frederick
General Counsel to the Board
The University of Texas System
Filed: November 20, 2006

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).